

PAPERS AND ADDRESSES

WILLIAM GILBERT DAVIES



man who was killed
by lightning -
, many

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PAPERS AND ADDRESSES

BY

WILLIAM GILBERT DAVIES, S.B., LL.D.



IN 1801



NEW YORK

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BY
WILLIAM GILBERT DAVIES, S.B., LL.D.



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To

THE DEVOTED WIFE

TO WHOSE LOVING ENCOURAGEMENT SO MANY OF

THE FOLLOWING PAGES ARE DUE

THIS VOLUME IS AFFECTIONATELY DEDICATED

BY THE AUTHOR



FOREWORD



I DO not think it is necessary to assign any reason for publishing this book, except for what seems to me to be a very natural desire to collect into one volume my scattered publications, so that they may all be available for the use of my family and friends. It will be seen that they have been written at different times and cover a wide range of subjects; so I trust every one into whose possession this book may come will find something to interest him or her. They were composed in brief intervals snatched from a busy professional life, and represent what should have been leisure moments, as my real work is preserved in the records of the Insurance Company with which I was connected for many years.

AR-Y-BRYN, TUXEDO PARK, N. Y.



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THE STONE MASON OF CROMARTY

DELIVERED AT THE JUNIOR EXHIBITION OF
THE CLASS '60, TRINITY COLLEGE,
HARTFORD, MAY 10TH, 1859



“THE STONE MASON OF CROMARTY”

IN a little fishing-town on Cromarty Frith stands the birthplace of Hugh Miller. Born and educated in sight of the sea, it was to him only an object of terror and abhorrence. Father, grandfather, and two uncles lay buried beneath its green waves. His earliest recollection was the vision of an outstretched hand and arm, which appeared to him the night his father's vessel, with all on board, sank into that great sepulchre.

A few years later we behold him at the common school of Cromarty, acquiring the first principles of education. While there he seized with delight every opportunity to play the truant, and loved to wander along the shores of his native frith, or climb the lofty mountains which overshadow it. Fearless in disposition, vigorous in mind, healthy in body, he could not endure the confinement necessary to study, nor the authority exercised over him by his relations. It is related by his biographer that he became a stone mason because his uncle had declared in that trade he could never succeed.

The scene now changes, and we behold the future scholar engaged in the humble occupation I have mentioned, laboring, sometimes in the north of Scotland, sometimes in the

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south, sometimes reveling in the monstrous wages of one dollar *per diem*, sometimes finding no work at all. At Inverness he advertised himself to "cut tombstones neatly and correctly." But wherever his love of wandering led him, in whatever occupation he was engaged, we perceive his mind busily occupied in adding to his store of knowledge. When, worn out by the fatigues of the day, he reached his humble home at night, he possessed sufficient energy to apply himself to severe study till nature was exhausted. Thus for fifteen years did he pursue his laborious course, a book in one hand, a chisel in the other.

During this period, his literary life may be said to have commenced. He published a volume of verses, but was so much discouraged by the treatment it received that he did not dare to issue a second work. He was so incautious as to mention upon the title-page that they were the productions of a journeyman mason. This statement furnished the keynote which every critic struck. One and all advised him to stick to his trowel, and leave the pen to those who were better qualified to guide it.

The scene again changes, and we behold him the accountant of a bank established in his native town. After continuing this business for five years, the great schism in the Kirk of Scotland broke out, and Hugh Miller was chosen editor of the *Edinburgh Witness*, the organ of the Free Church Party. His situation as editor of a widely circulated and influential journal gave him fresh courage, and shortly after assuming that post he published his first prose work, the "Old Red Sandstone," which achieved a remarkable

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success, and was soon followed by his "Footprints of the Creator."

We now see the mason in the new characters of an author and a scholar. The seeds of information which he had been collecting during so many years now bore their fruit, and Hugh Miller took his stand among the writers of the world. Nor was it in science alone that he wielded an able pen and exhibited a well-cultivated and powerful mind. His contributions to polite literature are as remarkable and praiseworthy as his labors for geology are valuable and useful. Of this class it will be sufficient to mention a single instance. In 1847 he published "First Impressions of England and its People," in which, to quote from his reviewer, "he displays unrivaled quickness and breadth of observation, and bold and subtle powers of generalization." Throughout this work, as all his others, shines forth his love for his Maker. "He has not adopted one of the free and sceptical notions about religion which are so widely circulated among poets, philosophers, and critics. He would stand up with the humblest of his countrymen, in avowing and defending 'the faith once delivered to the Saints.'" But we need enter no further upon this analysis of his writings. We have already said sufficient to show the extent of his literary labors, and the versatility of his genius. Whether his subject were science or travels, story or biography, he proved himself to be a true scholar, an able writer, — last, but not least, a Christian man.

In his "Footprints of the Creator," Hugh Miller applied his energies to the most glorious labor which human genius

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can undertake, the defense of religion against scepticism and infidelity. The contest concerning the Biblical account of the Creation, often carried on with vehemence by the opponents and promoters of Christianity, was then revived. A book entitled "Vestiges of the Creation," had declared that the story of Moses was erroneous, in fact, absurd. The lovers of religion everywhere were roused by the assertion, and among their foremost champions was Hugh Miller. Of the exquisite style of this work it is unnecessary to speak, while its arguments are deemed irresistible.

Hard labor and incessant study ruined his vigorous constitution, and enfeebled his mind. Though naturally courageous, he suddenly conceived a great dread of robbers, and imagined that frequent attempts were made to break into his museum. Every night, a broadsword was hung at the head of his bed, while loaded pistols were laid near his hand. Shortly after this first symptom, a new form of cerebral disease attacked him, which, while it lasted, gave him almost unendurable agony. But the last scene of his life was now rapidly approaching. One night, appearing unusually cheerful and well, he spent the evening with his wife and children, and amused them by reading extracts from his works. Not a thought was there of the sudden death so soon to break up that little circle. No grim phantom of agony and despair arose before them. All was bright and happy, and he, the centre of the group, appeared once more to enjoy the full possession of his health and faculties. But Death, though concealed, was present. Hugh Miller retired, seemingly in far better spirits than he had been for a long time, and the

THE STONE MASON OF CROMARTY

next morning, his body was found lying upon the floor of his room. Near him was a discharged pistol, upon the table was a sheet of paper bearing a few fond farewell words to his wife; and by the act of his own hand the spirit of the scholar-mason had passed away to Him who gave it, to encounter judgment; — let us hope, forgiveness.

Hugh Miller fell a martyr to his zeal for study. We have already seen how, under all circumstances, he applied himself to books: whether, chisel in hand, he wrought in the quarries of Scotland, or with the pen cast up long rows of figures in the banking office of Cromarty, every spare moment was devoted to the acquisition of knowledge. Engaged in this pursuit, he knew no weariness, felt no fatigue. Persevering, determined to surmount every obstacle, he presents to our view an amount of labor which is rarely equaled. Towards the close of his life he was occupied in writing articles for the *Witness*, delivering lectures on Geology, and preparing a work for the press at the same time. The body of a Hercules, and the brain of a Webster, could not long sustain such exertions. But he felt that he had a *mission* to perform, he felt that his talents were not given him to be wasted, and, as long as his strength endured, he devoted himself to usefulness; until at last his mind forsook him, and in one rash moment the silver cord was loosened, the golden bowl was broken.

The patient watcher of the stars, seated in his lonely chamber, sees a bright meteor flash across the sky. With lightning velocity it speeds upon its way, cleaving the dark shades of night, and illuminating heaven and earth with its sparkling beams. But, ere reaching the zenith, it vanishes, and

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naught but its memory remains. Like the course of this flaming visitant was the career of Hugh Miller. Born and bred in obscurity, receiving only the elements of education, he suddenly appeared before the world in the threefold character of the self-taught scholar, the defender of religion, and the martyr to his love of science. "His race is run, his errand done," but when the names of warriors and conquerors shall have passed away, the Stone mason of Cromarty will be remembered as one who used his talents for their noblest ends, for the advancement of true science, for the glory of his God.



CLASS-DAY POEM, '60.

TRINITY COLLEGE, JUNE 7TH.



CLASS-DAY POEM, '60

A LONE in my lofty chamber*
I sat in a Summer dream,
And saw through my open window
The lights of the city gleam.
One by one extinguished
They passed from my sight away,
And before me, in solemn silence,
The slumbering city lay.
From the bowl of my trusty meerschaum
The curling smoke-wreaths rise
And float on the evening breeze above
To the dark blue silent skies.
The silvery moon sails on
O'er the pathway of the Ghosts;
While the fleecy clouds, like spirit shrouds,
Envelop the mighty hosts
Which tread the Milky Way,
Where, as Indian legends tell,
The shades of those who were best on earth
In the Land of Hereafter dwell.

* At this time Trinity College occupied the hill where the State Capitol now stands.

CLASS-DAY POEM, '60

And the steeple clock is tolling,
 With its hands all folded tight,
To breathe a prayer for all that's fair
 At twelve o'clock at night.
All nature is still and quiet;
 No sound is heard but the breeze
As it sings among the countless leaves
 Of our sturdy "Campus" trees.
The floods of the golden moonlight
 Above and about me roll,
And fill with poetic ardor
 My earthward-groveling soul.

I dream of ancient legends,
 Of many an olden tale, —
Of ladies fair, with smiling eyes,
 Of knights in iron mail;
Of Crecy and of Agincourt
 Where fell the gallants of France;
Of Cœur de Lion and Saladin,
 And heroes of old romance;
Of Bois Guilbert, and of Ivanhoe,
 Unstained by reproach of fear;
Of Gonsalvo, Spain's great Captain;
 Of Bayard, *le preux chevalier*.
And I dream of the lovely dames for whom
 They strove to be good and brave:
As the Roman matron smiled at death
 Her husband's honor to save,

CLASS-DAY POEM, '60

So, with proud look and smiling eye
They battled with their grief,
And bade their knights go forth to war
For the glory of their chief.
Such was fair Rowena, who fled away
From her father's home to sail
O'er the ocean wide with her Viking bold,
Fearing nor storm nor gale.
Such Guinevere, whose beautiful face
Led Lancelot to sin;
Such Rebecca, whose large, dark, lustrous eyes
Revealed the soul within;
Such many a maid who, like sweet Elaine,
Wept over her lover's shield;
Whose favors waved o'er helmets bright
On many a well-fought field.
Thus dreaming, I remember
An ancient tale I'll tell
Now, when we meet together
For our long and sad farewell.
As we sit in the pleasant coolness
Of this gray-grown chapel wall,
And across our grassy "Campus"
The evening shadows fall;
As the leaves in the gentle zephyrs
Rustle to and fro,
I'll sing you a legend, *Classmates*,
Of what happened long ago.

CLASS-DAY POEM, '60

The day was slowly waning: the sun had sunk to rest,
And the sunset clouds were rising from out the glowing West:
With many a changing color and form they mount on high,
And unfurl their gorgeous banners across the western sky.
The twilight gently lingering weeps 'neath her azure veil;
And with drooping heads the flowers sigh as the day grows
pale.

Then, as deeper grows the darkness, and lower sinks the sun,
The glittering army of the stars comes forward one by one; —
The jewels in Heaven's coronet, they sparkle clear and bright
And diffuse their pleasant radiance thro' the calm cool summer
night.

The Great Bear stalks majestic toward the Northern Pole,
While Perseus presses forward, impatient, to his goal,
Andromeda stands helpless, wrapped in her long dark hair,
While anxious Cassiopëa watches from her royal chair,
Aquarius pours forth torrents from his inverted vase,
And o'er them transformed Leda glides with matchless
swanly grace.

The Pleiads, mourning their lost sister, cluster in their broken
group,

And Orion, in his glittering belt arrayed, surveys the troup.
The soft moon rises slowly, and before her mellow light,
Awed by her glorious beauty, the stars become less bright.
Her golden beams fall gently, and dance o'er hill and dale,
And disperse the gloomy shadows far down the woody vale,
Where the lonely Usk creeps sluggishly upon its winding way,
While on its placid bosom sparkles every silvery ray.

Formed by their elfish motions, the glittering path is seen,

CLASS-DAY POEM, '60

Which seems to lead to Heaven, as in Jacob's holy dream.
But, alas! like every pleasure which in this world lures us on,
The moment we approach it, that moment it is gone.
As the scene becomes still brighter, it shows a royal train
Moving along the river with bursts of minstrel strain;
The moon-beams, falling o'er it, flash back from lance and
helm,

From suits of linkèd armor, and from regal diadem.
With shouts of joyous laughter, they gaily pass along,
With many a playful jest, and many a merry song.
But their leader, wan and downcast, rides foremost and alone.
His armor bent and broken, his crested helmet gone;
The flush of shame is on his cheek; grief lurks within his eye,
Laughter and jest he heeds not, nor deigns he to reply!
For that day was held a tournament on the lovely banks of
Usk,

From the dawning of gray sunlight to the setting in of dusk,
And before the day was ended the sun shone on the field
Strewn with broken spears and lances, and dented helm and
shield;

For the Knights of the Round Table met every one that came,
And fought the fight for life or death, for honor and for fame.
Right gallantly and bravely those knights had held their own,
And before the spear of Lancelot the doughtiest chief went
down.

Yet next to him, the noblest was one unknown to all;
Ne'er before had any seen him near Caerleon's palace hall.
Black and gloomy, firmly fastened, was the iron mail he wore.
While no herald's mark of honor glittered on the shield he bore.

CLASS-DAY POEM, '60

Tho' thus devoid of glory, no carpet knight was he,
But versed in every weapon used in days of chivalrie.
With lance in rest, he fearless plunged into the thickest fray,
And to his arm his party owed victory that day;
Before his charge, full many a knight was hurled upon the
ground,
Who was numbered with the chosen band that filled the
Table Round;
Full many a knight grown old in war, and covered with renown
From glorious deeds in battle, before that lance went down.
Where'er he rode upon the field the wondering crowd fell
back,
And wounded knights, with broken spears, lay stretched upon
his track.
The people standing 'round the lists gazed on him with sur-
prise,
As one by one he conquered the lords before their eyes;
As rang on shield and helmet his fierce and mighty blows,
As tribute to his prowess, shout after shout arose.
The ladies, who, in those days, loved gallant men to see,
Who with "*suaviter in modo*," joined "*fortiter in re*," —
Waved their silken scarfs and kerchiefs in honor of the knight,
And gazed on him with smiling eyes, from the lofty galleries'
height.
The faultless King, Sir Arthur, his actions marked with pride,
Wondering that such strength and skill in such a stripling
could abide.
To test him, he himself resolved to combat in the field
In armor undistinguished, with no badge upon his shield.

CLASS-DAY POEM, '60

Descending from his lofty throne, whereon he sat in state,
Donning hastily his helmet, he hied him to the gate
Where sat the heralds to whom every knight that came that day
Must declare his name and lineage e'er entering in the fray.
Once admitted, he rode forward, regardless of his danger,
Seeking only, in the *mêlée*, to meet the gallant stranger;
Soon he saw him coming towards him, leading on his conquering band,

While steed and horseman sank to earth before his mighty brand.

When these champions saw each other, each laid his lance in rest

And covered with his iron shield his stout and dauntless breast,
Each shook his rein, and touched with spur his fiery foaming steed,

And urged him on with voice and heel to reach his utmost speed.

The lance of each was splintered into fragments by the shock,
But the stranger in his saddle sat unmoved as any rock.

Not so the King! who from his horse was hurlèd by the blow,
And in the dusty plain his royal head was pillowed low.

Then rose again the plebeian shouts to greet the victorious hand,

For they knew not that the vanquished was the mightiest in the land.

In pain arose King Arthur from the ground whereon he lay,
And in mingled shame and anguish he slowly crept away.

Then casting off his armor, he again assumed his crown,
And, mounting to the galleries, upon his throne sat down;

CLASS-DAY POEM, '60

He spake to brave Sir Lancelot of the Lake, who by him stood,
Who, of all the Knights in Christendom, was accounted great
and good;

Who his equal in the lists of battle never yet had found,
The strongest lance and bravest sword of all the Table Round.
Him bade the King to arm with speed, and go forth in his
might

To vindicate his honor 'gainst the young and dauntless knight.
Right gladly armed Sir Lancelot and sprang upon his horse,
And with visor closed, and spear in rest, rode slowly down the
course.

The stranger came to meet him, though sore afraid was he,
Knowing full well that by his arm he'd surely vanquished be;
His own lance was broken, but by the laws of the fray
He must receive his adversary's point as best he may.
Before that frightful weapon of lancewood strong and good,
No Christian and no heathen ever yet unharmed had stood;
Right thro' the shield and breastplate the pointed iron rushed,
And from out the wound, in torrents, the bright-red life-blood
gushed.

But the stranger smote Sir Lancelot so stoutly with his blade,
That broken was his helmet, and a ghastly wound was made;
So stunning was the blow the good knight in his saddle reeled,
While his opponent, sorely injured, departed from the field:
He hastened to his squire, who soon drew forth the steel,
And in a hermitage awaited until his wound should heal.
Meanwhile the fight had ended, and the heralds made pro-
claim

That Sir Tristram of Leonesse was the brave stranger's name.

CLASS-DAY POEM, '60

To him the King awarded, as was most justly due,
The victory in the combat, as a warrior bold and true.
But when the Marshals sought him, to deliver him the prize,
He, unseen and unregarded, had vanished from their eyes.
Grieved then was good King Arthur, and grieved was all his
court,

For they feared the noble chieftain had perished in the sport.
Then called the King two of his knights and gave them strict
command

To go forth from his presence, and search throughout the land,
Till they should find Sir Tristram, that he might numbered be
With the Knights of the Round Table in their goodly com-
panie.

Then, as the day was ended and night's shadows 'gan to fall,
The King returned in silence to Caerleon's palace hall.

By hap, a short time after, Sir Lancelot sallied forth,
Resolved to seek for glory and adventure in the North.
Clad in his linkèd armor, his good lance in his hand,
While, by his side, within its sheath, rested his famous brand,
He departed, unattended, all evils to repress, —
The unprotected to defend, their injuries to redress.
As he reached a pleasant meadow, beside a flowing stream,
Thro' the gently-waving greenwood he beheld bright armor
gleam;

And from out the leafy forest into the lovely glade
A knight rode forth to meet him, for battle all arrayed.
Like two vast thunder clouds the warriors 'gainst each other
dash, —

CLASS-DAY POEM, '60

As in a Summer evening the forkèd lightnings flash.
So fierce was the encounter, broken was each saddle girth,
And each from off his charger fell headlong to the earth.
A moment, and from out their scabbards leap the good swords
 bright,
And with quick attack and parry flash in the clear sunlight.
Thus, long they fought together, until the gurgling blood
Dyed ground and sword and armor with its bright and crimson flood.

Sir Lancelot, astonished, "By my good faith!" cried he,
"Thou fight'st as well as any knight I ever yet did see.
Thy name and lineage I would ask." Then out the stranger spake:
"Mine is Tristram of Leonesse! Thine?" "Lancelot of the Lake!"

Then down threw those stalwart warriors their bent and bloody brands,
And swore eternal friendship upon their good right hands.
And each took off his armor, and washed away his gore,
And side by side set forward for Arthur's court once more.
As with merry jest and laughter they through the forest went,
They encountered Sir Gaheris and Sir Gawain by Arthur sent
In search of brave Sir Tristram to travel thro' the realm
And never to return until they brought him back with them.
Right glad were they with Lancelot the long-sought knight to see,
And they all rode on together in a goodly companie.
When they reached the palace courtyard, straightway came the monarch out,

CLASS-DAY POEM, '60

With his train of gallant nobles encircling him about.
“Welcome! Welcome!” cried he, as he took Sir Tristram by
the hand;
“Welcome, for as brave and true a knight as lives within this
land!”
“Welcome!” said all the nobles, and they passed within the
hall.
“Welcome! Welcome! good Sir Tristram,” said the Queen
and ladies all.

I have told this story, Classmates,
In my awkward, halting rhyme,
To show the deeds which knights performed
In battle, in old time.
And as, when the fight was over,
And the victor gained the prize, —
He deemed he saw his best reward
In a lady's smiling eyes; —
So *we*, who have termed ourselves
Knights of the Table Round,
In the praise of those whom most we love
Our highest joy have found!
As *they* made every effort
To win themselves a name,
So *we* have struggled manfully
For honor and for fame!
We have fought the fight together
In our quiet College life,
And we now go forth, tho' singly,

CLASS-DAY POEM, '60

To a greater, nobler strife.
We have fought the battle bravely,
We have done our duty here,
And of our success hereafter
We should have no sickly fear!
Only keep one holy object
Ever bright before our eyes; —
And determine “To act well *our* part;
There all the honor lies!” —
So that when we reach life’s sunset
And review the path we’ve trod,
We may feel that we have labored
“For our Country and our God!”
And when our day is ended, —
Our spirit gained its goal,
We may each feel — “I have kept the Faith,
And Christ receives my soul!”



ALCHEMY AND THE ALCHEMISTS

COMMENCEMENT ORATION, JUNE 28TH, 1860



ALCHEMY AND THE ALCHEMISTS

TO investigate the gradual development of the human mind, to trace an idea, expanded slowly by successive generations until it becomes a fact, to follow back a principle of science, step by step, until we reach its germ in some apparently unimportant and trivial thought, is always a curious, as well as interesting, process. The great work of man is improvement, and thus it happens that nothing springs perfected into being, but, commencing with the little seed, slowly and by almost imperceptible gradations becomes the strong and full-grown tree. Every great discovery or invention, whether in science, philosophy, or art, has passed through this process, and it is by noting their developments that we read the history of the human mind.

In this study, we often — I might say, always — see him who is far in advance of his age scoffed at as an enthusiast or an idiot. Not only a Galileo is persecuted for daring to maintain that the planets move, not only a Columbus overwhelmed with scorn for believing that an undiscovered world exists. Yet for such men the laurel crown is surely woven, though the brows upon which it should repose have returned to dust before their merit is acknowledged. They sink to rest, but the memory of their deeds remains, and future ages

ALCHEMY AND THE ALCHEMISTS

appreciate their labors and deplore their fate. Thus has it been with the alchemists. Derided and ridiculed for nearly three hundred years, laughed at as the wildest of all enthusiasts, the most romantic of all dreamers, — now offered their niche in the temple, among those who devoted themselves to science. Modern chemistry acknowledges that their labors laid the foundation of her noble structure, and from their discoveries she has elucidated many of her most important truths. She asserts even that the Philosopher's Stone, whose magic touch was to transform every metal into gold, is not merely the fancy of a diseased imagination, but a problem whose solution she will soon obtain. Under these circumstances, it may not be useless or unentertaining to consider briefly their history and their aims.

Alchemy was first cultivated by the Arabs and, like most of the natural sciences, by them imparted to Europe. This science, with its astounding discoveries — its wonderful information concerning the composition of the works of nature — its still more attractive promises of boundless wealth and endless life, offered most tempting allurements. Can we wonder that in those dark ages of superstition and folly such a system as this should have met success? Can we wonder that, when those who were accounted men of learning were induced by its grains of truth to accept also its mass of chaff, the vulgar and illiterate should be dazzled by its pretensions? With such enticements and such advocates, we need not deem it strange that, a few centuries later, we find it universally received. Monks, like Roger Bacon, practised it in the dark recesses of their cells. Kings, like Henry VI of England,

ALCHEMY AND THE ALCHEMISTS

endeavored by means of it to recruit their empty coffers. Nobles and commoners expended their fortunes, and wasted their lives, in the vain effort to penetrate its mysteries. In those days the student of nature did not, as now, invite the world to view his labors and participate in the fruits of his discoveries. The alchemist shunned the public gaze and courted the deepest retirement and seclusion. We read the lives of those who, immured in their lonely cells, surrounded by alembics and retorts, and seeing no human face, ate, watched, and slept through weary days and anxious nights for ten long years, maintaining an undying fire beneath the huge still whose product was expected to reward all their labors; and then saw the object of so many hopes and fears ruined by some unforeseen catastrophe. Yet, undeterred and undiscouraged, the patient philosopher would recommence his hopeless task. Before such perseverance and such energy we stand astonished, and regret it was not devoted to some more practical end.

The votaries of alchemy insisted that its principles were first asserted by Solomon and Pythagoras, and that beneath the solid structure of the Great Pyramid Hermes deposited the secret of the Philosopher's Stone, written with letters of emerald upon plates of gold. Even men of learning and students of the classics bent their influence to support these fancies. Suidas himself gravely states that the Golden Fleece for which the Argonauts encountered so many perils was a parchment scroll, on which was inscribed the method for transmuting metals.

As the ages grew still darker, and the human mind yielded

ALCHEMY AND THE ALCHEMISTS

itself a willing prey to every superstition and folly, alchemy degenerated into mere magic and mysticism. A pantheistic tone becomes apparent among the students of the time, and every chemical reaction is ascribed to supernatural agency. This was but natural at a period when even the Church had lost sight of the One Triune God, and called for the intervention of saints and minor deities in all the affairs of life. This disposition culminates with Paracelsus at the beginning of the sixteenth century. To him, an imprisoned sprite was enclosed in every base, while a fierce and flaming demon lurked in every acid. Every operation of nature, every chemical union, was ascribed to a contest between these invisible spirits, as we may trace in many of the names still used by chemists.

The Reformation came, with its glorious light, sweeping away the thick cobwebs of superstition and error, and illuminating the dark recesses of the human mind. Men awoke from the lethargy in which they had so long slumbered, and throwing off the yoke of intellectual servitude learned to think and act for themselves. Science, no less than religion, felt the influence of the change, and rose at once to its true position. No longer groping in obscure and narrow paths, no longer resting on false hypotheses and imperfect reasoning, alchemy established the unalterable dictum, that nothing should be assumed which could not be clearly proved. With her followers in this age begins the epoch of inductive reasoning, and she emerges from her chrysalis in the form of modern chemistry. The reign of superstition is ended, the dominion of true science takes its place.

ALCHEMY AND THE ALCHEMISTS

The ends of the alchemists were lofty, their aspirations noble. They hoped that their efforts would ameliorate the condition of the human race, and render the world happier and better. They were actuated by no selfish desire to obtain wealth for themselves alone, but intended to furnish it freely to all mankind. Nor should we consider their expectations absurd or ridiculous. The great Sir Humphrey Davy was led by his researches to declare as his opinion that chemistry would soon make gold the commonest of metals. The later experiments of Schönbein and Faraday tend to increase this probability, and confirm their hopes. When we see the same substance existing as the common and unsightly charcoal and the rare and sparkling diamond, the brittle phosphorus, inflamed by the slightest friction, changed into a dark elastic substance which no heat can kindle, sulphur losing all its ordinary properties and becoming a dark and viscid fluid, oxygen so altered as to be capable of identification only by the most subtle test, we may readily believe that gold and silver may be only other forms of some baser metal. Consider also that many of these elements have the same atomic weight, and our argument from analogy is complete.

Such, in brief, is the history of the alchemists, and the end for which they labored. And although I recognize and deplore their errors, I would ascribe them to the spirit of the age, especially to the influence of a corrupted church, rather than to the science, or its followers. We can view in the clear light of scientific knowledge what they saw "as through a glass, darkly," we can investigate what they, with limited apparatus and still more limited means, could only conjecture.

ALCHEMY AND THE ALCHEMISTS

I would claim for them a proper appreciation as men who devoted themselves to science for the benefit of mankind. More than all, I would honor them as the real founders of modern chemistry: — a science to which much of the civilization of the world is due for the discoveries she has made, and the improvements she has promoted in agriculture and the arts: a science which has furnished incalculable aid to medicine by the information she has given concerning our bodies, and the best manner of preserving and perfecting them. And especially, a science which, more than any other, shows the omniscience of the Designing Mind which could from a few simple elements form the endless variety of natural objects which encircle us, and in which we see reflected, as in a mirror, His goodness and His power.



TWELFTH-NIGHT OBSERVANCES

A PAPER READ BEFORE THE ST. NICHOLAS CLUB
JANUARY 6TH, 1887



TWELFTH-NIGHT OBSERVANCES

Gentlemen of the St. Nicholas Club:

THE occasion suggests, or rather prescribes, the subject. Having been invited to read a paper to you on "Twelfth-Night," it is imperative to take for a text the associations of the festival. It would seem proper that I should refer rather to its social than to its ecclesiastical features; yet it is so essentially a church festival in its character, that it is impossible to avoid mention of the legend which gives significance to the day. Coming at the end of the Christmas holidays, the last of the thirteen days devoted, from the earliest period of the Christian Era, to the celebration of the manifestation of God in the flesh, the picture of the Holy Babe smiling from his mother's knee upon the Wise Men of the East kneeling before him is the one which first comes to our minds as the great event which the Western Church has always remembered on this anniversary. In the Eastern Church other incidents were held to have occurred at the same time; such as the baptism of our Lord in the River Jordan, the miracle of the multiplication of the five loaves and the two fishes, and the first miracle, the changing of water into wine at the marriage in Cana in Galilee. It was in vague allusion to the latter that it was for centuries in some of the Eastern churches

TWELFTH-NIGHT OBSERVANCES

the custom to fetch water from the springs at midnight on this festival, in the belief that it would then keep fresh and pure through the whole of the coming year. But the Western churches without exception have celebrated, on the so-called "Little Christmas," only the visit of the Magi or Wise Men to the infant Saviour.

The legend alluded to has appeared in many forms, but I take by preference the one given by Mrs. Clement in her "Handbook of Legendary and Mythological Art." According to her story, these Magi were not men who knew the arts of magic, but wise princes of some Eastern country. The prophecy of Balaam had been held in remembrance by their people, — "I shall see him, but not now; I shall behold him, but not nigh; there shall come a star out of Jacob, and a sceptre shall rise out of Israel." And when they saw a star differing from those which, as learned astronomers, they had studied, they recognized it as the star of the prophecy, and at once followed where it led. It has been said that the star when first seen had the form of a child bearing a sceptre or cross. The Wise Men said farewell to their homes and friends, and took numerous attendants for their long journey. After many perils and difficulties, the climbing of mountains, the crossing of deep streams, they came to Jerusalem. On inquiring for the king they sought, they were directed to Bethlehem, and asked by Herod to bring him news on their return of where the child could be found, that he too might worship him. At length the star stood still over the lowly place where Jesus was. No matter how different may have been their previous imaginings from the reality they found,

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their faith was equal to the demand upon it, and they bowed down; thus giving themselves first, and then presented the gold, which signified that Jesus was King; the frankincense that he was God; and the myrrh, that he was suffering man, and must yield to death. In return for their gifts Christ gave them charity and spiritual riches in place of gold; perfect faith for their incense; and for the myrrh, truth and meekness of spirit. The Virgin gave them, as a precious memorial, one of the linen bands in which she had wrapped the divine child.

Being warned in a dream, they returned not to Herod, but went by another way. There is a legend that their homeward journey was made in ships, and in a commentary on the Psalms, of the fifth century, it is said that when Herod found that they had escaped from him in "ships of Tarsus," he burned all the vessels in the port. But, however they returned, the legend states that the star guided them to the East as it had led them from it, and they reached their homes in safety. They never again assumed their former state, but in imitation of their new sovereign they gave their wealth to the poor, and went about to preach the new Gospel of Peace. There is a tradition that after forty years, when St. Thomas went to the Indies, he met there these wise men, and baptized them; and afterward, as they continued to preach, they went among barbarians and were put to death. Long after, their remains were found, and the Empress Helena had them removed to Constantinople. During the first crusade they were removed to Milan, and lastly the Emperor Barbarossa placed them in the cathedral at Cologne, where

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they remain in a costly shrine, and have performed many wonderful miracles. The names of these three "Kings of Cologne," as they are often called, are Jaspar or Caspar, Melchior, and Balthasar. In the pictures they are of three ages: the first, Jaspar, very old, with gray beard; Melchior, of middle age; and Balthasar, always young, and sometimes a Moor or black man, to signify that he was of Ethiopia, and that Christ came to all races of men.

Chambers, in the "Book of Days," enlarges somewhat upon the significance of the three gifts. According to this authority, Melchior presented the gold to the infant Saviour in testimony of his royalty as the promised King of the Jews; Jaspar, the frankincense in token of his divinity; and Balthasar, the myrrh in allusion to the sorrows which, in the humiliating condition of a man, our Redeemer vouchsafed to take upon Him.

As far back as the days of King Alfred, the chroniclers inform us, a statute was enacted in relation to holidays by virtue of which the twelve days after the Nativity were made festivals. We should expect, therefore, to find in English history that "Twelfth-Night," as the last of these festivals, should have many special observances connected with it; and such in fact proves to be the case.

The dancers around Squire Raby's hearth in Charles Reade's novel, called "Put Yourself in His Place," executing a sword-dance in honor of King George, were doubtless perpetuating a custom even older than Christianity; but it is worth while to observe that all the special festivities of the time have, in some degree, an association with royalty and

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authoritative station. Thus, the King of the Bean was a dignity recognized in the two universities of England, as well as in the Inns of Court, and annually conferred upon the lucky individual who found the bean in the divided cake, on "Twelfth-Night," and the custom has existed for many centuries. "At court, in the eighth year of Edward III, this majestic title was conferred upon one of the king's minstrels, as we find by an entry in a *computus* so dated, which states that sixty shillings were given by the king upon the day of the Epiphany, to Rogan, the trumpeter, and his associates the court minstrels, in the name of the King of the Bean."

Cognate to this, and celebrated usually at the same time, was the Festival of Fools, when a mock bishop or Pope was elected, who, attended by a proper ecclesiastical court, attired in ridiculous dresses, imitated the most sacred services of the Church, with every conceivable accompaniment of profanity and indecency. In the north of England Fool-plow goes about, — a pageant that consists of a number of sword-dancers dragging a plow about, with music, and one, or sometimes two of them, attired in very antic dress: as the Bessy in the grotesque habit of an old woman, and the Fool almost covered with skins, a hairy cap on his head, and the tail of some animal hanging down his back. The office of one of these characters is to go about rattling a box among the spectators of the dance, to collect their little donations; and it is remarkable that in some places where this pageant is retained they plow up the soil before any house where they receive no reward. The pageant and the dance seem to be a composition of gleanings of several obsolete customs followed

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anciently. The Fool and the Bessy are plainly fragments of the Festival of Fools.

Mr. Strutt, from whose "Sports and Pastimes of the People of England" I have taken the foregoing story, adds that the Fool-plow was perhaps the Yule-plow; it is also called the white-plow, because the gallant young men who compose the pageant appear to be dressed in their shirts, without coats or waistcoats, upon which great numbers of ribbons folded into roses are loosely stitched.

The Wassails, which originally were a New Year's custom, prevailed in Cornwall within a century as a "Twelfth-Night" observance. The wassail bowl, a bowl of spiced ale, was carried about by young women from door to door in their several parishes; they sang a few couplets of homely verses composed for the occasion, and presented the liquor to the inhabitants of the house where they called, expecting a small gratuity in return. This custom is supposed to be derived from a time of remote antiquity, and to have originated in the words of Rowena, the daughter of Hengist, who, presenting a bowl of wine to Vortigern, the king of the Britons, said, "*Waes Hael*," or Health to you, my lord the King!

The limited time at my disposal prevents me from referring to the ceremonies of the Yule-tide, although some of them extended throughout the entire period of the holidays.

For this assembly, so largely descended from the sturdy burghers who tranquilly smoked their pipes on the stoops of New Amsterdam in the long ago, I was desirous of describing some peculiarly Dutch custom, but I have been unable to find any, with perhaps a single exception. I hesitate to cite

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here so irreverent a work as the "History of New-York," by the late Diedrich Knickerbocker, but that somewhat untrustworthy author occasionally allowed himself to be led away by the truth, and the inherent probabilities that he did so in the passage I am about to quote are very strong. In speaking of the usual assemblage at the Governor's House, on the first day of the year, he says: "On this occasion the good Peter was devoutly observant of the pious Dutch rite of kissing the women-kind for a Happy New-Year; and it is traditional that Antony the trumpeter, who acted as Gentleman Usher, took toll of all who were young and handsome as they passed through the ante-chamber. This venerable custom, thus happily introduced, was followed with such zeal by high and low that on New-Year's Day, during the reign of Peter Stuyvesant, New Amsterdam was the most thoroughly be-kissed community in all Christendom."

Accepting the theory of heredity and reasoning from the descendants back to the ancestors, may we not fairly and reasonably infer that this pleasing custom was not allowed to fall into desuetude with the day, but was continued through the remainder of the holidays, until it culminated on this anniversary? It appears to me to be worthy of consideration whether the members of this Club should not, in pious reverence for the memory of their ancestors, endeavor to restore so agreeable an observance, and again make this a prominent feature in their celebration of this day.

I have outlined very briefly the customs of the past. *Cui bono* do you ask? Of what advantage is it to spend time in the consideration of these beliefs and manners of departed

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generations? Taking only the purely material view, I hold that in this busy, active life, especially in the turmoil of this great city, with its unceasing pressure and drain upon brain and muscle, anything is an advantage and a benefit which will, if only for a few moments, free us from the cares and worries of every day, and turn our minds into new pastures of thought or fancy. It is related of one of the ancient philosophers that he would play leap-frog with his disciples until in danger of discovery by some one who had not sufficient capacity for labor to appreciate the necessity for relaxation; and a wiser than Grecian sage has told us that there is a time to laugh, as there is a time to work.

Let us, for this evening at least, believe that the kindly beams of the "Twelfth-Night" Star fall on us as brightly as they fell on the Three Kings of old, and pray that they may lead us, as they led them, — though it may be through toils and struggles, — to happiness and peace at last!



MYSTERIES AND MASQUES

A PAPER READ BEFORE THE ST. NICHOLAS CLUB ON
TWELFTH-NIGHT, 1892



MYSTERIES AND MASQUES

Gentlemen of the St. Nicholas Club:

YOUR House Committee has honored me by an invitation to read a paper before you this evening, but did not have the kindness to suggest a subject, and left me to my own resources. On a former occasion I related some of the ancient customs and observances incidental to the Twelfth-Night celebrations of old, and in the endeavor to find some cognate topic I have decided to ask your attention to a brief account of the stage representations which, beginning with the rude and uncouth miracles and moralities of a remote antiquity, developed into the magnificent masques of the sixteenth and seventeenth centuries, employing all that was best and finest in the literature and art of the period.

The primitive Christians were not supporters of the drama. The new religion was to them something very real and earnest, of an absorbing nature, and their devotion to it and to its propagation left them but little leisure for the amusements and relaxations of life. Believing in all sincerity that they were called upon to save a perishing world, which could be brought to future happiness only through the glad tidings which they preached, and believing equally that the end of all things was near at hand, the work to be done was too

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great, and the time to work in too short, to permit of any waste of opportunity or any indulgence in leisure. Perhaps, too, the fact that so many of them were compelled to be prominent actors in the festivities of the period, in *rôles* of a most depressing and unpleasant character, had the not unnatural effect of weakening their taste for spectacular performances.

So to the extent of their influence the drama languished, and when they came into power, and in the fourth century not only refused the sacraments of the Church to all actors and mountebanks, but excommunicated all who went to the theatre on Sundays and other holidays instead of attending divine service, theatrical representations fell for the time into utter disrepute and then into abeyance. With a natural result — the average man is not so constituted that he can live always on the high plane of preparation for a future state, in which the spirit only is to survive and the body with its passions and desires be utterly non-existent. He must have some concession made to his longing for entertainment in this world; and in an ignorant age, when the vast majority of mankind had but little to vary the dull monotony of their lives, when there was for the great mass no literature, no art, no music, no culture, the necessity for amusement became imperative, and in the absence of theatres and gladiatorial shows, minstrels, jongleurs, mountebanks, traveling performers of all kinds began to appear in response to the demand. Quick to appreciate the position, the clergy accommodated themselves to circumstances, and even in the fifth century increased the attraction of public worship on special occasions by living

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pictures and songs illustrating the narrative of the Gospel. This gradually developed until in the tenth century, on the great ecclesiastical festivals, it was customary to perform the offices of the Shepherds, the Innocents, the Holy Sepulchre, etc., and in France, in the eleventh century, short Latin texts were written for these liturgical mysteries, including passages from the popular legend of St. Nicholas as well as from the Scriptural story.

Three Latin miracles written early in the twelfth century by Hilarius, a disciple of Abelard, are extant; the subjects are, the raising of Lazarus, the life of St. Nicholas, and the history of Daniel.

I should have been very glad to have described the miracle of the life of St. Nicholas, but I have been unable to find a copy of it. I think it fair to assume that it depicted the good Saint in his two great acts of throwing purses through the window of the impoverished nobleman, to enable him to dower his portionless daughters, and of resurrecting the pickled children from the pork-barrel of the wicked landlord. He was pre-eminently the Saint of serfdom, of maidens and scholars, travelers and children, mariners and all who were downtrodden and oppressed. Mrs. Jameson, in her "Sacred and Legendary Art," says that, "While Knighthood had its St. George, Serfhood had its St. Nicholas. He was emphatically the Saint of the people; the *bourgeois* Saint, invoked by the peaccable citizen, by the laborer who toiled for his daily bread, by the merchant who traded from shore to shore, by the mariner struggling with the stormy ocean. He was the protector of the weak against the strong, of the poor against

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the rich, of the captive, the prisoner, the slave; he was the guardian of young marriageable maidens, of schoolboys, and especially of the orphan poor. In Russia, Greece, and throughout all Catholic Europe, children are still taught to reverence St. Nicholas, and to consider themselves as placed under his peculiar care; 'if they are good, docile, and attentive to their studies, St. Nicholas, on the eve of his festival, will graciously fill their cap or their stocking with dainties, while he has as certainly a rod in pickle for the idle and unruly.'"

While he was regarded as one to be especially invoked in time of peril by thieves, he appears to have been esteemed by them as their especial patron, and the expression "clerks of St. Nicholas" was applied to them by common consent. In the early times, when every noble was a cruel oppressor, and every serf felt himself justified *in foro conscientiae* in redressing what he felt to be injustice by every means in his power, the thief was a champion of the rights of his class, and no doubt thought himself entitled to the protection of the one who had ever been the champion of the weak against the strong. It may well be also that the thief recalled the action of St. Nicholas at his episcopal seat of Myra when he took grain from the Government ships on their way to Alexandria, to feed his starving people, and felt entitled to his sympathy in robbing the rich, if after doing so he divided his spoil with the poor. It is hard to have to acknowledge that the good Bishop was in fact only the ante-type of the later Robin Hood, but the legends attached to his name compel me to the conclusion that such was really the case.

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In those early days, the stage on which these representations were given was so constructed that it could be moved from place to place. As described by Strutt in his "Manners and Customs of the English," it consisted of three several platforms or stages, raised one above another. "On the uppermost sat the *Pater Cælestis*, surrounded with his angels; on the second appeared the holy Saints and glorified men; and the last and lowest was occupied by mere men who had not yet passed from this transitory life to the regions of eternity. On one side of this lowest platform was the resemblance of a dark pitchy cavern from whence issued appearance of fire and flames; and, when it was necessary, the audience were treated with hideous yellings and noises as imitative of the howlings and cries of the wretched souls tormented by the relentless demons. From this yawning cave the devils themselves constantly ascended to delight and instruct the spectators; to delight, because they were usually the greatest jesters and buffoons that then appeared; and to instruct, for that they treated the wretched mortals who were delivered to them with the utmost cruelty, warning thereby all men carefully to avoid falling into the clutches of such hardened and remorseless spirits." A realistic picture of an intensely realistic age, when little or nothing was left to the imagination, and everything which it was intended the spectators should comprehend was presented to them with the utmost directness and simplicity. Disraeli in his "Curiosities of Literature" mentions a play acted in one of the principal cities of England, under the direction of the trading companies of the city, before a numerous assemblage of both

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sexes, wherein Adam and Eve appeared on the stage entirely naked, performing their whole part in the representation of Eden, to the serpent's temptation, to the eating of the forbidden fruit, the perceiving of and conversing about their nakedness, and to the supplying of fig leaves to cover it.

The most flourishing period of these plays was when they were presented by the trading companies of the different cities, and of these the most important in England were the performances in Chester and Coventry. Of the former, the fullest accounts have been preserved. They were exhibited as early as 1268, continuing with few interruptions until 1577, and consisted of twenty-four dramas which were represented from Whit-Monday until the following Wednesday. Among the subjects are, "The Fall of Lucifer," performed by the Tanners; "The Creation," by the Drapers; "The Deluge," by the Dyers; "Abraham, Melchizedek and Lot," by the Barbers and Wax-chandlers; "Moses, Balak and Balaam," by the Hatters and Linen-drapers; "The Killing of the Innocents," by the Goldsmiths; "The Descent into Hell," by the Cooks; "The Ascension," by the Tailors; "Antichrist," by the Dyers; and "The Day of Judgment," by the Websters or Weavers. According to a description written toward the close of the sixteenth century, "Every company had his pageant, which pageants were a high scaffold with two rooms, a higher and a lower, upon four wheels. In the lower they appareled themselves, and in the higher they played, being all open at the top that all beholders might hear and see them. The places where they played were in every street. They began first at the Abbey gates, and when the

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first pageant was played it was wheeled to the high Cross before the Mayor and so to every street, and so every street had a pageant playing before them at one time until all the pageants appointed for the day were played; and when one pageant was near ended, word was brought from street to street, that so they might come in place thereof exceedingly orderly, and all the streets have their pageants afore them all at one time playing together; to see which plays was great resort, and also scaffolds and stages made in the streets in those places where they determined to play their pageants."

These pageants received different names, according to the subjects represented. Thus the "Mysteries," so called, deal with Scriptural events only, and of this class is the "Passion Play," performed decennially at Ober-Ammergau, the best-known survival of these mediæval customs. The "Miracles" were strictly concerned with the legends of the Saints of the Church, and the "Moralities" were where the characters represented feigned or allegorical personages. Disraeli gives an account of one very old one, entitled "The Condemnation of Feasts, to the Praise of Diet and Sobriety for the benefit of the Human Body"; a subject of much importance to all of us even at the present time. Toward the close is a trial between *Feasting* and *Supper*. They are summoned before *Experience*, the Lord Chief Justice. *Feasting* and *Supper* are accused of having murdered four persons by force of gorging them. *Experience* condemns *Feasting* to the gallows, and his executioner is *Diet*. *Feasting* asks for a father confessor, and makes a public confession of so many crimes, such numerous convulsions, apoplexies, headaches, and

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stomach qualms, etc., which he has occasioned, that his executioner, *Diet*, in a rage stops his mouth, puts the cord about his neck and strangles him. *Supper* is only condemned to load his hands with a certain quantity of lead, to hinder him from putting too many dishes on the table; he is also bound over to remain at the distance of six hours' walking from *Dinner*, upon pain of death. *Supper* felicitates himself upon his escape, and swears to observe the mitigated sentence.

At the Council of Constance, in the year 1417, the English fathers gave a mystery of "The Massacre of the Holy Innocents." In this play a low buffoon was introduced, desiring of his lord to be dubbed a knight, that he might be properly qualified to go on the adventure of killing the mothers of the children of Bethlehem, which was treated with the most ridiculous levity. The good women of Bethlehem attacked the knight errant with their spinning-wheels, broke his head with their distaffs, abused him as a coward and disgrace to chivalry, and sent him home to Herod as a recreant champion, with much ignominy.

From these representations, slowly progressing and improving through the ages, came the Masques, which reached their highest development during the first half of the seventeenth century. I think that the most of us form our idea of what we know of the drama of that period from our associations with Shakspeare and the Globe Theatre, and because we have read that there the scene was indicated by putting up a sign reading that "This is a castle," or "This is a blasted heath," we infer that this was the highest point which dramatic art had then attained. But this conception, so gen-

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erally entertained, utterly ignores what Disraeli terms the most gorgeous, the most fascinating, and the most poetical of dramatic amusements, which combined all that was exquisite in the imitative arts of poetry, painting, music, song, dancing, and machinery at a period when the public theatre was in its rude infancy. Says Gifford, in his "Memoirs of Ben Jonson": "The Masque, as it attained its highest degree of excellence, admitted of dialogue, singing, and dancing; these were not independent of one another, but combined, by the introduction of some ingenious fable, into an harmonious whole. When the plan was formed, the aid of the sister-arts was called in; for the essence of the Masque was pomp and glory. Movable scenery of the most costly and splendid kind was lavished on the Masque; the most celebrated Masters were employed on the songs and dances; and all that the kingdom afforded of vocal and instrumental excellence was employed to embellish the exhibition." Thus magnificently constructed, the Masque was not committed to ordinary performers. It was composed, as Lord Bacon says, for princes, and by princes it was played. Of these Masques, the skill with which their ornaments were designed, and the inexpressible grace with which they were executed, appear to have left a vivid impression on the mind of Jonson. His genius awakes at once, and all his faculties attune to sprightliness and pleasure. He makes his appearance like his own Delight, accompanied with Grace, Love, Harmony, Revel, Sport, and Laughter.

"But in what was the taste of the times wretched? In poetry, painting, architecture, they have not since been

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equaled; and it ill becomes us to arraign the taste of a period which possessed a cluster of writers of which the meanest would now be esteemed a prodigy." Indeed, I find it very easy to believe that a spectacular representation produced without any reference to the cost, for which Ben Jonson wrote the words, Henry Lawes composed the music, and Inigo Jones designed the machinery, would compare very favorably with the Black Crooks and Puppen-Fees of to-day. It seems to be beyond doubt that the movable scenery formed as perfect an illusion as any that our own age, with all its perfection in decoration, has attained, and it is equally beyond doubt that this result was exceedingly expensive. "The Masque of Blackness," by Jonson and Jones, performed at Whitehall on Twelfth-Night, 1603, cost what would now be nearly ten thousand pounds sterling, and the Earl of Strafford in his "Letters" remarks, "There are two Masques in hand, the first of the Inns of Court, which is to be presented on Candlemas Day; the other, the King presents the Queen with on Shrove Tuesday at night; high expenses, they talk of twenty thousand pounds sterling that it will cost the men of the law"; a very much larger sum three and a half centuries ago than it is to-day, but which even now would seem to poor lawyers a great deal of money to expend upon an evening's entertainment.

To show the elaborate character of the scenery in these performances, permit me to describe the "Lord's Masque," presented on the occasion of the marriage of the daughter of James I to the Elector Palatine in 1613. The scene was divided into two parts, from the roof to the floor; the lower

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part being first discovered, there appeared a wood in perspective, the innermost part being of "releeve or whole round," the rest painted. On the left a cave, and on the right a thicket from which issued Orpheus. At the back part of the scene, at the sudden fall of a curtain, the upper part broke on the spectators, a heaven of clouds of all hues; the stars suddenly vanished, the clouds dispersed; an element of artificial fire played about the house of Prometheus; a bright and transparent cloud, reaching from the heavens to the earth, whence the eight Masques descended with the music of a full song; and at the end of their descent the cloud broke in twain, and one part of it, as with a wind, was blown athwart the scene. While this cloud was vanishing, the wood, being the under part of the scene, was insensibly changing; a perspective view opened, with porticos on each side and female statues of silver, accompanied with ornaments of architecture, filling the end of the house of Prometheus, and seeming all of goldsmiths' work. The women of Prometheus descended from their niches, till the anger of Jupiter turned them again into statues. It is evident, too, that the size of the proscenium or stage accorded with the magnificence of the scene; for choruses are described and "changeable conveyances of the song," in manner of an echo performed by more than forty different voices and instruments in various parts of the scene. The architectural decorations were the pride of Inigo Jones; such could not be trivial.

Masques were frequently the private theatricals of the families of the nobility, performed by the ladies and gentle-

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men at their seats, and were splendidly gotten up on certain occasions, such as the celebration of nuptials, or in compliment to some great visitor. The Masque of "Comus" was composed by Milton, to celebrate the creation of Charles I as Prince of Wales, in 1616, after the death of his elder brother, Prince Henry. But the very perfection and magnificence of those performances ultimately caused their ruin, through the enormous expense involved. The youthful days of Louis XIV raised them to a height of costly luxuriance, to sink them ever after in oblivion; they ended in gaudy dresses and expensive machinery, but poetry was not associated with them. To conclude with the quotation from Jonson with which Disraeli, from whose writings I have mainly taken this description, ends his sketch:

"The glory of all these solemnities had perished like a blaze, and gone out in the beholders' eyes: so short lived are the bodies of all things in comparison of their souls."



THE SETTLEMENT OF NEW
AMSTERDAM

A PAPER READ BEFORE THE ST. NICHOLAS CLUB ON
JANUARY 6TH, 1893



THE SETTLEMENT OF NEW AMSTERDAM

Mr. President and Gentlemen of the St. Nicholas Club:

INVITED by your Committee to read before you a paper on some subject connected with the city of New York, it seemed to me only natural and proper to go back to those early days when our patron Saint was also the tutelary genius of this metropolis, and to describe the circumstances which placed him in that position, as well as those which withdrew from us his protecting care.

At the beginning of the seventeenth century, Holland was the mistress of the seas. Her successful revolt against the oppression and tyranny of Spain, and her long maritime warfare with that power, had made her sons skilful and hardy seamen, so that on the achievement of her independence she controlled the commerce of the world. Her navies swept the seas as clean then as they did some fifty years later, when stout Van Tromp sailed through the English Channel with a broom nailed to his mast-head, a token at once of triumph and derision. The East India Company conquered islands and kingdoms in Asia. With a fleet of two hundred ships they carried on trade with China and Japan, they brought to Europe the productions of the Spice Islands and the gold, the pearls and the jewels of the East.

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“Amsterdam,” says Bancroft, “was the centre of the commerce of Europe. The sea not only bathed its walls but entered among its streets, and the fleets of its merchantmen, as seen from the ramparts, lay so crowded together that vision was interrupted by the thick forests of masts and yards. War for liberty became unexpectedly a guaranty of opulence. Holland gained the commerce of Spain by its maritime force: it secured the wealth of the Indies by traffic. Lisbon and Antwerp were despoiled: Amsterdam, the depot of the merchandize of Europe and of the East, was esteemed beyond dispute the first commercial city of the world.”

It was an age of discovery, of enterprise, and of colonization, and the success of the East India Company stimulated the good burghers of Amsterdam to turn their endeavors towards the Western Hemisphere, and so it came to pass that Hendrik Hudson, who had already sailed on two voyages of discovery under the English flag, was engaged by them to hazard himself again. On the 4th of April, 1609, he left that port in the *Halfmoon*, a little boat of only eighty tons burden, and after vainly seeking the northwest passage by Nova Zembla, where fields of ice barred his way, he passed beyond Greenland and Newfoundland, by Cape Cod, which he named New Holland, as far south as the Bay of Virginia; and turning again to the north he entered and examined Delaware Bay, and on the 3d of September anchored within Sandy Hook. Delaying there a week, he passed through the Narrows, and at the mouth of the river which now bears his name anchored in a harbor which he pronounced to be very good for all winds.

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After so long a voyage, it was but natural that the venture-some explorers should wish to set their feet on the fair land which they saw before them, and Hudson accordingly had a boat manned and rowed to the shore. Of what happened on his arrival, the best account is the Indian tradition which has been preserved in Heckwelder's History.

After describing the approach of the big house floating on the sea, and the assemblage of the natives to see what it might portend, it goes on to say that the house, or large canoe, stopped, a smaller canoe came ashore having, among others, a red man in it. This was probably Hudson clothed in the uniform he had worn in the English service. "The chiefs and wise men form a circle, into which the red man and two attendants approach. He salutes them with friendly countenance, and they return the salute after their manner. They are amazed at their color and dress, particularly at him who, glittering in red, wore something (perhaps lace and buttons) they could not comprehend. He must be the great Manitto, they thought, but why should he have a white skin. A large elegant gourd is brought by one of the Manitto's servants, from which a substance is poured into a small cup or glass, and handed to the Manitto. He drinks, has the glass refilled, and handed to the chief near him. He takes it, smells it, and passes it to the next, who does the same. The glass in this manner is passed around the circle, and is about to be returned to the red-clothed man, when one of them, a great warrior, harangues them on the impropriety of returning the cup unemptied. It was handed to them, he said, by the Manitto, to drink out of it as he had. To follow his example

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would please him, to reject it might provoke his wrath. And if no one else would he would drink it himself, let what would follow, for it were better for one even to die, than a whole nation to be destroyed. He then took the glass, smelled it, again addressed them, bidding adieu, and drank the contents. All eyes were now fixed on him. He soon began to stagger. The women cried, supposing him in fits. He rolled on the ground. They bemoan his fate. They thought him dying. He fell asleep. They at first thought he had expired, but soon perceived he still breathed. He awoke, jumped up, and declared he never felt more happy. He asked for more, and the whole assembly, imitating him, became intoxicated." This ingenious account of the first visit of an European to these shores certainly gives at least plausibility to a definition propounded by the late J. W. Moulton in his "New York in 1673." Manhattan, he says, was named by the Indians Man-a-hatta, to denote, according to the Lenni-Lenapi, or Delawares, not only the landing-place of the discoverer, but the effect of the "mad-waters," which he gave to the natives on his first interview: the literal interpretation of the name being "the place where we all got drunk," a name which might well be applied to the fair city of to-day, by some of the incautious victims of her hospitality. In the next year (1610), during which Hudson set out upon the voyage which was to have for him so tragic an ending, the Dutch sent vessels to open a trade with the natives for peltries, which soon became very profitable. In 1611 the *Little Fox* and the *Little Crane* came upon speculative voyages, their owners bartering the trinkets and trifles

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coveted by the Indians for beaver and other skins. A few huts were erected as early as 1613 for sheltering the fur trade and the whale fishery, which latter was then of importance, on the spot where it was supposed Hudson had landed, forming the nucleus of the little village afterwards known as New Amsterdam. But even this tiny settlement was not suffered to rest undisturbed. The English governor of Virginia, Argall, returning from his piratical expedition against the little French Colony of Port Royal, compelled the Dutch Governor, Hendrik Christiansen, who was powerless to resist, to submit himself and his people to the English governor, and through him to the King of England. But next year, Eelkins, a new governor, came out from Amsterdam with re-enforcements, resumed possession of the Province and defied the English. He built a fort at the southwestern extremity of the Island, where the barge office and Battery now are, and it is to be presumed that St. Nicholas improved in spirits and took courage.

This expedition resulted from the enterprise of an association of Amsterdam and Hoorn merchants by whom Block and other explorers had been employed, who gave the name of New Netherland to the infant colony, and under the title of the United New Netherland Company obtained from the States General the exclusive right for three years "to visit and penetrate the said lands lying in America between new France and Virginia, whereof the coasts extend from the fortieth to the forty-fifth degree of latitude," that is, from Delaware to Passamaquoddy Bay.

But the years passed by and no colony worthy of the name

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had been established. New Netherland was only a collection of trading-posts, and when the charter of the company expired, the general dissatisfaction with the results of their labor prevented its renewal. Trading operations continued, but no steps were taken towards effecting permanent settlements, until an old project of a West India Company was revived, and a corporation under that name was created in 1621, with power not only over New Netherland, but the whole American coast, which at once applied itself energetically to work.

The first party of actual colonists sent out by the Company sailed from Amsterdam early in March, 1623, in a little vessel of 260 tons burden called the *New Netherland*, and commanded by Captain Cornelis Jacobs of Hoorn. It consisted of thirty families of Protestant Walloons from the Spanish Netherlands, refugees from persecution on account of their religious belief. The course then pursued across the Atlantic was to the Canary Islands, thence towards the American coast, until the trade winds were gained, and the favorable breezes so aided our first immigrants that early in May they found themselves in the River Mauritius, as the Hudson was then called. They at once commenced to erect huts for their immediate accommodation on the southerly point of the Island, and the cattle which they had brought with them were turned out upon Governor's Island, it being impossible with the scanty resources at their command to confine them within safe limits near themselves, and highly hazardous to allow them to stroll out into the Indian neighborhood. With this party came Joris Jansen de Rapelje and the young woman

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who soon after became his bride, from which union resulted, on June 9, 1625, the first born Christian daughter in the colony of New Netherland.

These first settlers soon after removed to the western shore of Long Island, and their place of residence, taking its name from them, preserves to this day the memory of their arrival in its title of Wallabout Bay. But the West India Company, while largely absorbed in chartering privateers to prey upon Spanish commerce, did not wholly neglect the immense territory which had been intrusted to its fostering care. A treaty of alliance having been made between England and the United Netherlands, it perceived that it might proceed with colonization without danger of further interference from the former power. It at once entered upon the consideration of a new form of government as well as the discussion of plans for inducing settlers to emigrate. The first governor, Peter Minuit, was appointed, who sailed from Amsterdam in December in the ship *Sea-View*, and arrived in Manhattan on the 4th of May, 1626.

His first proceeding was to treat with the natives for the purchase of the soil on which the new city was to be erected, and his negotiations resulted in the conveyance to him, and his successors as representatives of the Company, of the entire Island of Manhattan for various trinkets and similar articles appealing strongly to the savage taste, estimated to be worth about twenty-four dollars of our present currency. This price has often been quoted as a ridiculously small consideration, but it is to be remembered that it was paid for the land alone in its native state; not only no buildings of importance,

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but no pavements, no sidewalks, no sewers, nay even no roads, no improvements of any character were then in existence. Considering the hundreds of thousands of dollars which have since been expended in public improvements, to say nothing of the millions which individuals have converted into brick and mortar, and considering further that the twenty-four dollars then paid would to-day, compounded at six per cent interest, amount to over one hundred and fifteen millions of dollars, I am not sure but that the honest old Dutchman was beguiled by the savages into paying what was really a fancy price in the first recorded real estate transaction on this Island.

The stream of emigration, once set flowing, continued to swell in volume and new settlers came over every year. The first dwelling huts were built mostly after the Indian fashion, with saplings and bark, with some improvements suggested by the experience of civilization, such as wooden chimneys and glazed windows. Some of the colonists having greater regard for comfort than for outward show, constructed cellars, which, being sided with bark, and covered with thatched reeds, were sufficiently warm, though deficient in light.

In the course of a few years the establishment of sawmills supplied timber for more substantial abodes and a class of buildings of one story in height, with two rooms on a floor and a garret overhead, became the common style of architecture. These cottages were framed and clapboarded and the roofs thatched, but as yet the chimneys were made of wood, from the want of brick and mortar to construct less dangerous flues. The houses were commonly surrounded

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by strong palisades, as a protection against the savages. The interior of these humble edifices presented, as may be supposed, simply the necessary articles of furniture for every-day purposes. The great chest, with its precious stores of household goods, was the most imposing article; chairs were supplied by stools, rough hewn from the forest. Tables were of domestic manufacture; rough shelves formed the only cupboard. The bedstead was the sleeping bench, but upon it the great feather-bed lay in state, and gave in comfort all that was wanting in display.

The second Dutch Governor, Wouter Van Twiller, arrived, in April of 1633, in the *Salt Mountain*, a vessel of two hundred and eighty tons burden, manned by fifty-two men and carrying twenty guns. With him came the first detachment of troops sent to this country, consisting of one hundred and four men. With him also, or about the same time, came the first Dutch clergyman, the well-known Dominie Bogardus.

As a governor, Van Twiller was not a success. His vacillation of character, which gained him the soubriquet of the Doubter, and that fatality which seems to impel weak men to be obstinate at the wrong time and place, involved him in constant difficulties. Harassed by the English on the east, and the Swedes on the south, both of whom were constantly encroaching on the territories which he was bound to protect, and tormented by frequent struggles with the Indians, he found his task one of unceasing annoyance. Besides all these external troubles, the government of the colony itself required qualities of statesmanship and diplomacy of a high order. The States General had adopted a charter of privi-

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leges for patrons who desired to plant colonies, which was analogous to the political institutions of the Dutch of that day. While as much land as he could cultivate was promised to every one who would emigrate on his own account, it was not expected that the peasants who enjoyed no political franchises, and had consequently no idea of independent action, would of themselves undertake the long and expensive journey. The effort was therefore made to induce men of a higher class to take the initiative, and he who within four years would plant a colony of fifty souls became Lord of the Manor, or Patroon, possessing absolutely the lands he might colonize, which might extend sixteen miles in length, or, if they lay upon a river, eight miles on each bank, extending back indefinitely into the interior. As a consequence the directors and agents of the Company themselves appropriated the most valuable portions of the territory, and acquired title to all the important points where the natives came to traffic. The Company desired to reserve to itself this trade, and constant collisions between the feudal possessors and the central government resulted. So it must have been as much of a relief to Van Twiller as to every one else concerned when on the 28th of March, 1638, the good ship *Herring* came into port bringing a new governor in the person of William Kieft. This, for the unfortunate colonists, was exchanging King Log for King Stork. Not long after his arrival a Hollander was murdered by the son of a chief, who felt himself defrauded and robbed, one of a long series of similar crimes caused by inhumanity on the one side, and revenge on the other, and Kieft inexorably

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demanded the surrender of the murderer. A deputation of the river chieftains hastened to deplore the circumstance, and, as they could not deliver up the murderer, to offer to pay an appropriate fine to the relatives of the victim. "You yourselves," they added, "are the cause of this evil: you ought not to craze the young Indians with brandy. Your own people, when drunk, fight with knives, and do foolish things; and you cannot prevent mischief, till you cease to sell strong drink to the Indian."

The argument was true but unconvincing. Taking advantage of an attack by the Mohawks upon the Algonquins, and the appeal of the latter weaker race for assistance, the soldiers of the fort, joined by freebooters from Dutch privateers, and led by a guide who knew where to find the recesses across the Hudson in which the cowering fugitives had concealed themselves, attacked them in the stillness of a dark winter's night, and killed nearly a hundred of the helpless savages without regard to sex or age. The exultation which the governor displayed to his returning troops was short-lived. The news of the massacre spread rapidly and excited a bitter feeling of revenge, whose effects were soon exhibited in villages laid waste, farms destroyed, murder on every side, and a complete demoralization of the settlers, of whom all who could fled terrified back to Holland. The war continued for two years, until both parties were wearied and exhausted, and peace was concluded in a solemn conclave at the Battery of the Sachems of New Jersey, of the River Indians, of the Mohicans, and of those from Long Island, with the chiefs of the Five Nations as witnesses and arbitrators, on the one

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side, and the governor and council of New Netherland, with the whole commonalty of the Dutch, on the other. But the joy with which peace was hailed only intensified the general feeling of hatred for the governor, to whose barbarous policy so much distress was due, and the demand for his recall was universal. About two years after the peace he sailed for Europe, but the vessel which bore him was wrecked upon the coast of Wales, and his infamy rewarded with an ocean grave.

To whom succeeded the brave and honest Stuyvesant, promoted from the position of Vice-Director of Curacao, a scholar of some learning and a soldier of experience. Seen through the mists that shroud that early time, he looms up a romantic, almost a grand character. He assumed his position on the 11th May, 1647, and as he conciliated the natives and succeeded in removing restriction upon commerce, an era of prosperity began to dawn. New settlers began to pour in, and the growing commerce added to the wealth and prosperity of the city. A spirit of local improvement was awakened among the citizens. By this time many of them, through industry and frugality, two of the most notable Dutch virtues, had become possessed of considerable wealth, their children had grown up knowing no other scenes and naturally wishing to make the most of their position, and the differences of accumulations, and consequent social position, were beginning to produce their natural result.

It was about the year 1656 that this era attained its culmination. Several of the merchants had at that time erected stone dwelling-houses and the general style of living had considerably advanced throughout all classes. The interior

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decorations of the habitations were much improved: great high-post bedsteads, with their dimity curtains, adorned the parlors of the great; cupboards of nut-wood, imported from the old country, were to be seen in some of the principal establishments. Even silver plate was displayed in one or two instances, as evidence of increased prosperity. In 1657 Peter Cornelis Vanderveen constructed a fine house on the present Pearl Street, and in 1658 Governor Stuyvesant erected a large house in the vicinity of the present Whitehall Street, the name of which is derived from the White Hall of the Dutch governor.

As was but natural in a young and busy community, Sunday was the only day of rest, and the religious sentiment of the age compelled its strict observance. On that day the domestic duties of the week were suspended, and the people arrayed themselves in their best attire to attend the services appropriate to the occasion. They were almost exclusively Calvinists, and were rigid in the performance of their religious duties. The bell-ringer and sexton was one of the marked personages. Having summoned the congregation by the sound of the church bell, the ceremonious duty followed of forming a procession of himself and his assistants to carry in the cushions of the Burgomasters and Schepens from the City Hall to furnish the church pew appropriated to those magistrates. The Schout at the same hour went his rounds to observe that quiet was kept in the streets during the time of service, and to stop the games of the negro and Indian slaves to whom Sunday was allowed for recreation, except during church time. As the church edifice was within the

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walls of the fort, the present Bowling Green, then an open field, displayed a numerous concourse of country wagons, arrayed in order, while the horses were let loose to graze on the shady hillside which led down to the water near the present Battery.

Limitations of time compel me to pass without comment the Governor's wars with the Swedes, the Indians, and the English, and come at once to the date when King Charles the Second, disregarding the rights and settlements of the Dutch, granted all New Netherland to his brother James, Duke of York and Albany, better known in history as King James the Second. The patent passed the Great Seal on the 12th of March, 1664, and Colonel Richard Nichols, who had been appointed governor, proceeded with four frigates and three hundred men directly to Manhattan for the conquest of the Dutch. After having demanded recruits from Massachusetts, and taken on board Governor John Winthrop of Connecticut, the fleet approached the Narrows, and on August 28th anchored in Gravesend Bay.

It is time to see what capabilities of defense the city possessed.

I have already spoken of the fort erected in 1614 at the southern extremity of the Island, then called Fort Manhattan, which was, however, but a palisaded work. In 1626, on the arrival of Governor Minuit, it was greatly enlarged under the direction of an engineer officer, Kyrm Frederick, and its name changed to Fort Amsterdam. It was for a long period an earthwork, though planned on scientific principles, and of the shape and size which it always afterwards maintained.

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As emergencies arose which called for strengthening it, additional stone work was raised in place of the earthen walls, and in course of time it presented stone faces on every side, and was a formidable fortress.

On the north the city was defended by a line of palisades built across it nearly coincident with the present Wall Street, which had been erected in 1653 in anticipation of an invasion from New England. This consisted of posts twelve feet high, set six feet apart, sided up with boards and having an earthen embankment on the inner side sufficiently high to enable the defenders to stand on it and fire over the top. It was entered through two gates, one near Broadway and the other at the East River, both of which were defended by block houses. But these defenses, however valuable against savages and their fellow colonists, were of no avail against the force of the English. The governor himself was desirous of offering resistance, but the burgomasters were satisfied that it would be useless, and insisted upon surrender. At eight o'clock on the morning of September 8, 1664, Stuyvesant at the head of his troops marched out of the fort with all the honors of war, pursuant to the terms of the surrender, which also guaranteed to the conquered their religion, their law of inheritance, and their trade with Holland.

The governor with his troops marched down Beaver Street to the North River, where they embarked for Holland, and the unfortunate leader was called upon to answer for the capitulation to his superiors. Considering the force of the English, the apathy of the Dutch, and the inferior character of the fortifications, together with Peter Stuyvesant's well-

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earned reputation for bravery and skill in warfare, it is only fair to assume that he was fully justified in his conduct. But their High Mightinesses were highly and mightily enraged at the loss of their Province, and naturally inclined to put all the blame upon the unlucky responsible agent. They even professed to believe that motives of personal interest controlled the governor's action, and that he was mainly actuated by a desire to save his own White Hall from the destruction that would result from a bombardment.

Stuyvesant after making his report returned to the city in about two years, and spent the remainder of his life peacefully at his Bowerie, on a part of which St. Mark's Church now stands, where he died in 1682.

In 1667, by the treaty of Breda, New Netherland was ceded to the English, in return for which Holland received Surinam or Dutch Guiana. In the same year Nichols retired from his position and was succeeded by Francis Lovelace, whose theory of government was that "the method for keeping the people in order is severity, and laying such taxes as may give them liberty for no thought but how to discharge them." It is not to be wondered at that the people groaned under their new rulers, and that when in 1673, upon the renewal of war between England and Holland, a small squadron under command of Banckes, after having committed ravages in Virginia for the annoyance of English commerce, entered the harbor of New York for the purpose of regaining the lost possessions, it was received with enthusiasm. On the 30th of July the Dutch ships moored under the fort. The English governor was absent in Connecticut and his representa-

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tive had no means of defense. The Dutchman would admit of no excuses for delay in surrendering the fort which he claimed as rightfully belonging to his government. Men were landed on the North River shore above the city, marched across the fields into Broadway, and they fixed their standards and planted their cannon on the north end of Bowling Green, facing the fort gate. The fort at once surrendered and its garrison marched out. New York became New Orange and the fort exchanged the name of Fort James, which had been given it by its English possessors, for that of Fort William Hendrick. On the 12th of August the magistrates and principal burgher officers were assembled and finally absolved from their oaths of alliance taken to the British government. Anthony Colve who had accompanied the fleet was installed as governor, and the good burghers once more smoked their pipes in peace under the folds of the yellow flag.

But their comfort did not long continue. The treaty of Westminster between Great Britain and the States General was signed the following year, and by the Sixth Article New Netherland was restored to the English. The Duke of York confirmed his authority by a new patent, and appointed Major Andros to be his governor. The latter at once set sail with a strong force for his Province, but before his advent the sad news had already reached the little city. On the 15th of October Governor Colve appeared before the Burgomasters and Schepens assembled at his invitation in the City Hall, and advised them that he had received by the Government Ship *Muyll Tromp* letters and absolute orders from the Lords, Mayors, and their High Mightinesses for the

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restoration of the Province of New Netherland to his Majesty of Great Britain, pursuant to the Treaty of Peace concluded in February, and further orders for himself to return immediately with the garrison.

One week later (October 22, 1674) the new governor cast anchor and penned his first demand for the surrender of the Province.

A lengthy correspondence ensued between him and Governor Colve, dated by the former, "From aboard his Majesty's Ship The Diamond at Anker near Staten Island," conducted with great courtesy on both sides in reference to the details of the transfer and the privileges to be accorded to the Dutch residents. On the 9th November, 1674 (new style), Governor Colve released his compatriots from their allegiance to the States General, and on the 10th the English forces took possession of the fort and town, and the good St. Nicholas was definitely superseded by St. George.

The growth of the city had been slow — in 1615 it contained four houses and thirty inhabitants, and when captured by Nichols in 1664, he writes to the Duke of York that "such is the mean condition of this town that not one soldier to this day has lain in sheets or upon any other bed than straw." By a census taken in 1678, after the final surrender to the English, there were then but 343 houses and 3430 inhabitants.

In 1682 Thomas Dongan was made governor in place of Andros, and described the inhabitants of New York in a report to the Board of Trade made in 1687 in language which would not be altogether inappropriate to-day. He says that the city has "first a chaplain belonging to the Fort,

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of the Church of England: second, a Dutch Calvinist: thirdly, a French Calvinist; fourthly, a Dutch Lutheran. Here be not many of the Church of England; few Roman Catholics; abundance of Quaker preachers, men and women especially; singing Quakers, ranting Quakers; Sabbatarians; anti-Sabbatarians; some Anabaptists; some Independents; some Jews; in short, of all sorts of opinions there are some, and the most part of none at all."

At this time no fewer than eighteen languages were commonly spoken in its streets, and it foreshadowed the great metropolis it has since become.

It does not fall within the scope of this paper, or of the time allotted me, to give the details of its wonderful growth. But the principles of civil and religious liberty for which the citizens of that day constantly strove, until they finally compelled their acceptance by a selfish trading corporation and a tyrannical governor, are still cherished. Their triumph was assured when in 1660 the Directors wrote to Governor Stuyvesant: "Let every peaceful citizen enjoy freedom of conscience, this maxim has made our city the asylum for fugitives from every land: tread in its steps and you shall be blessed."

St. Nicholas is no longer recognized as the Patron Saint of the city founded under his care. Yet we may wisely and safely think we can still trace the gracious influence of that genial friend of childhood, and that the kindly feelings and sturdy virtues which he nourished will long flourish among the citizens of New York as they flourished among the burghers of New Amsterdam.



HISTORICAL SKETCH OF CHRIST CHURCH, NEW YORK CITY

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HISTORICAL SKETCH OF CHRIST CHURCH, NEW YORK CITY

CHRIST Church dates its organization back to the year 1793, and has ever since that date been identified with the history of this city, doing its work with zeal and fidelity through varying fortune, alternately encouraged and discouraged, and to-day looking forward hopefully to a bright and useful future. Such a sketch of its career as can be comprised within the limits of a brief notice will doubtless prove interesting to those who care for the antiquities and early chronicles of New York.

In the year just mentioned, the Rev. Joseph Pilmore was rector of the united churches of Trinity, St. Thomas, and All Saints in the city of Philadelphia. In company with a Mr. Boardman he was sent to this country by Mr. Wesley in the year 1769, in response to an appeal from the Methodist church, then and now situated in John Street, between Nassau and William streets, and at that time called Wesley Chapel, and was one of the earliest itinerant Methodist Wesleyan preachers in America. He and his companion are described as most laborious and devoted men, mighty travelers through the wilds of America in the days of Oglethorpe. Dr. Pilmore was born about the year 1734, in the

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village of Tedmouth, Yorkshire, England, his parents being persons of respectability, members of the Church of England. At the age of sixteen he became acquainted with the Rev. John Wesley, who was then preaching in various parts of the United Kingdom, and through his instrumentality became hopefully pious. He was educated at the school of Kingswood, where he acquired a fair amount of English literature as well as some knowledge of the Latin, Greek, and Hebrew languages, and, what was of far more importance, a taste for books and mental improvement which endured through a long life. After finishing his studies he was appointed by Mr. Wesley to travel as one of his itinerant lay preachers, and given a certificate by him as a "lay helper" in the work. After his arrival in this country he determined to adopt the principles of the Protestant Episcopal Church in America, and was ordained a Deacon by Bishop Seabury of Connecticut on the 27th of November, 1785, receiving Priest's orders at the hands of the same prelate on the 29th of that month after due canonical examination.

In June of the next year he was present at a general convention held at St. Paul's Church in this city, as a representative of his Philadelphia parish, at the height of the controversy between the churches of New England, which already enjoyed the Episcopate through the Scottish line of succession in the person of Dr. Samuel Seabury, and the more southern churches, which under the leadership of Doctors White and Provoost were endeavoring to obtain succession in the English line. This dissension seriously

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threatened for a time to prevent any general union of the Church in America, the members outside of New England declining to consent to any acts implying the validity of Dr. Seabury's ordinations. Efforts were made, but unsuccessfully, to expel Dr. Pilmore from the convention as not properly ordained, and a resolution was passed recommending the respective state conventions not to admit any person as a minister who should receive ordination from any Bishop residing in America during the application then pending to the English Bishops for Episcopal Consecration. The feelings excited by this controversy were bitter, and it is probable that Dr. Pilmore, who was a man of intense personality, made enemies as well as friends during its progress. It is evident that he had made many friends, for in 1793 a petition was presented by William Post and one hundred and seventy-two other members of Trinity Parish to the Vestry praying that the Rev. Joseph Pilmore might be called as an assistant minister, and a Sunday evening lecture established. This application having been declined, the petitioners determined to organize a parish of their own, and on the 3d of April, 1793, filed in the county clerk's office their certificate of incorporation under the name of Christ Church.

The infant parish at once called Dr. Pilmore as its rector, and proceeded to erect a house of worship on the north side of Ann Street between William and Nassau streets, on land conveyed to it by Mr. George Warner, one of its earliest and most generous benefactors. Dr. Pilmore assumed charge of the parish during the following year, and continued

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as its rector until October, 1804, when he was compelled by the failing health of his wife, under the advice of her physicians, to leave New York and remove to Philadelphia, where he became connected with St. Paul's Church, and where he resided until his death on July 24, 1825. He was a man of imposing presence, of great flow of language, and "impasioned oratory," usually commencing his sermons by reading from manuscript, but soon becoming carried away by his subject and bursting into eloquent extemporaneous flights of fancy. The church was usually crowded during his services, even standing room being scarcely obtainable.

The separation from Trinity, and the election of a rector who had been rejected by that parish, produced an opposition from that body to the new parish, and Christ Church was refused admission to the state convention. Delegates were duly appointed every year, and application for admission made, which was as regularly rejected, until 1802, when, nine years after the organization, it was formally admitted into fellowship with the other churches, upon executing to Trinity Parish a full deed of relinquishment of any claim which it might have to any portion of the property of that corporation. It was natural for Trinity to insist upon this condition, since its property had been given to the "Rector and Inhabitants of the City of New York in Communion with the Church of England as by law established," and there was plausible ground for other such inhabitants than those belonging to Trinity Parish to claim an interest in it. Indeed, some few years after this date (in 1812) quite a lively controversy sprang up over the asserted right of every

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Churchman in the city to vote at the election of vestrymen in that parish, and it was necessary to apply to the legislature for a special act to settle the dispute. By this time the harmony which has ever since existed had been completely established between the two parishes, and Christ Church earnestly seconded the efforts of her elder sister to effect the desired object.

On the 29th of July, 1804, the Rev. Thomas Lyell was duly elected rector in place of Dr. Pilmore, and on the 10th of March following formally inducted into the position, which he held for forty-four years until his death. In 1821 it was decided to abandon the old building in Ann Street and move farther up-town, a step rendered desirable by the growth of the city, and the close proximity of so many other churches of the same faith. In the immediate vicinity were Trinity Church and St. Paul's Chapel in their present sites, Grace Church at the corner of Broadway and Rector Street, the French Church *Du St. Esprit* in Pine Street opposite to where the Sub-Treasury now stands, and St. George's Church at the corner of Beekman and Cliff Streets. An opportunity occurred to obtain at a reasonable price five lots of land in Anthony (now Worth) Street, just west of Broadway and opposite the ground then occupied by the New York Hospital. The property, called the Anthony Street Theatre, had been fitted up as a circus by the proprietors of the old Park Street Theatre during the summer of 1817 for ballets and similar performances during the regular recess of the theatre, and when the latter was destroyed by fire on the 25th of May, 1820, the Anthony Street

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establishment was furnished and used in its stead until the building on the old site was completed in August, 1821. The church purchased the property in January, 1822, and at once proceeded to erect a handsome gray and brown-stone edifice in the pointed Gothic style, which was formally consecrated on the 29th of March, 1823. A few discontented persons who opposed the removal from Ann Street organized a parish under the leadership of Rev. John Sellon, which was called Christ Church in Ann Street, and commenced a suit in chancery to have themselves declared the *simon pure* Christ Church and entitled to the endowment which had been given it by Trinity Church. But the diocesan convention declined to recognize them as a parish under that title, the Court of Chancery dismissed their bill, and they lingered along until the close of the year 1825, when Mr. Sellon resigned and the parish fell to pieces. The property was purchased by a Roman Catholic congregation, which occupied the building until its destruction by fire in 1834, when the land was sold for business purposes.

The church continued to prosper under the leadership of Dr. Lyell, who was, like his predecessor, a convert from Methodism, and an earnest, eloquent preacher, and pursued a course of even and uneventful prosperity until the church edifice was destroyed by fire on July 30, 1847.

The parish hired temporary quarters in the Minerva Rooms, No. 406 Broadway, which it occupied for nearly a year while the work of rebuilding the church was pushed rapidly forward. But the rector did not live to see its completion. After a pastorate of the remarkable length of

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forty-four years, he died on the 5th of March, 1848. We are told by a member of his family that he was confined to his room only a single week, and died of influenza. This disease, which was not painful, was endured with entire patience and resignation. "He passed quietly out of the world as an infant drops asleep, having on his countenance in death an infant's innocent smile." The funeral services took place at St. Paul's Chapel on March 7, 1848, being Ash Wednesday, and the sermon was preached by the rector of Trinity Parish, the Rev. Dr. Berrian.

There must have been much that was lovable and attractive about a man who could continue as the rector of one parish for so long a period, sustain it through every vicissitude, and retain not only the affection of every member of his own parish, but the respect and esteem of every one with whom he was brought in contact. A tablet was erected to his memory in the church, which now stands in the vestry room of the edifice at present occupied by the parish.

The church was completed and consecrated on the 29th of June following, but the vacant pulpit was not permanently filled until the next October, when the Rev. Charles H. Halsey, at the time an agent of the Protestant Episcopal Board of Missions and previously rector of St. Paul's Church, Sing Sing, New York, was called to and accepted the charge of the parish. The rapid removal of the residence portion of the city farther up-town soon rendered the location of the church undesirable, and in April, 1852, a committee was appointed to consider the subject of removal. Their labors resulted in the sale of the Anthony Street property and the

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purchase of four lots of ground on the north side of Eighteenth Street, west of Fifth Avenue, on which was erected the church and rectory now occupied by St. Ann's Church for Deaf-Mutes. The new church was formally consecrated and occupied on June 30, 1854, and for some months previously the congregation worshiped in the chapel of the University, on Washington Square. On the 2d of May following the parish met a severe blow in the sudden death of their rector. He had on that day visited a new building adjoining the Everett House in Union Square, and while standing at a window in the fourth story lost his balance and fell to the street, never speaking after the fall and surviving the accident but half an hour. He was a man of great popularity, and his unexpected death awakened wide-spread sympathy for his bereaved family and congregation. He was succeeded by the Rev. F. S. Wiley, then rector of the Church of the Nativity in Philadelphia, who continued in charge of the parish until October, 1862, when increasing ill-health compelled him to resign his cure and remove to Italy, where he died at Florence, January 20, 1864. During his rectorship in July, 1858, the property in Eighteenth Street was exchanged for the church on Fifth Avenue, from which the parish removed to its present site.

In November, 1862, the Rev. Ferdinand C. Ewer, at that time assistant to the Rev. Dr. Gallaudet in St. Ann's Church, was invited to succeed Mr. Wiley, and accepted the call. The parish continued to prosper under his care until 1868, when he became imbued with the doctrines of the so-called ritualists, and preached his celebrated sermons on "Prot-

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estantism a Failure." The result was disastrous. Originally founded by those discontented with the church doctrine of Trinity Parish, Christ Church had always been distinctly, in party shibboleth, a *low* church, and many of the congregation were unable to follow their rector in his new departure. On the other hand, his great ability and striking personal qualities had endeared many to him who were unwilling to lose his guidance. So matters continued for a while, many of the dissatisfied leaving the parish and forming other connections, until November, 1871, when Dr. Ewer resigned and organized the new church of St. Ignatius, taking with him many of the members of Christ Church, who were personally attached to him, and leaving a wreck behind him. This condition of affairs was severely felt by his successor, the Rev. Hugh Miller Thompson, D.D., formerly of St. James's Church, Chicago, but he applied himself with great energy and ability to the work of rebuilding the parish, and had met with great success in his labors, when, in November, 1875, he received and accepted a call to the parish of Trinity Church, New Orleans. The separation was deeply deplored by his congregation and himself, but both parties felt that the new field offered wider opportunities for usefulness, and that it was his duty to assume the new burden.

For nearly a year after his departure the parish remained without a permanent rector until, on the 11th of December, 1876, the Rev. William A. McVickar, D.D., was called to the vacant post. His ministry was attended with the happiest results, and the parish was rapidly increasing in strength

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and prosperity when its bright prospects were momentarily darkened by his sudden and unexpected death, which occurred on the 24th of September, 1877, after a brief illness. The sympathy awakened by this blow was heartfelt and universal, and the bishop of the diocese took occasion, at the diocesan convention, which met in the same month, to refer in most touching and appreciative terms to the great loss sustained by the church and the parish. Space is too short to allow the writer to do more than allude to the affectionate manner in which the bishop spoke of him — as he really was — “the scholar, the gentleman, the earnest, thoughtful, reverent, loving minister of God.” He was succeeded by the Rev. J. S. Shipman, D.D., called November 9, 1877, the present rector.

Dr. Shipman entered Yale College in the class of '55, but, on account of seriously impaired health, was obliged to pursue the greater part of his course under private tuition. His instructor during those years in ancient languages and in philosophy, as afterward in theology, was one who is known as among the ripest scholars in the Church — the Reverend Professor Joseph M. Clarke, D.D., now holding the chair of Hebrew and Exegesis in the Divinity School at Nashotah. He was admitted to the diaconate by Bishop Delancey in St. Peter's Church, Auburn, in the autumn of 1857, and to the priesthood, by the same bishop, in Trinity Church, Utica, in the autumn of the following year.

His first cure was that of the united parishes of St. John's, Whitesboro', and St. Peter's, Oriskany, in what is now the diocese of Central New York. From this charge he accepted

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a call in 1859 to the rectorship of Christ Church, Mobile — the oldest and largest parish in Alabama. In 1862, soon after the outbreak of the war, he resigned this parish to accept that of Christ Church, Lexington, Kentucky — from which, after a pastorate extending over sixteen years, and after declining the offer of a bishopric, he came to this city. It conveys a high tribute to his tact and good judgment to say that during the troubled time of the civil war, in that borderland of conflict, where old friendships and even family ties were often severed by the passions of the hour, he succeeded in maintaining peace and kindly feeling among the different members of his congregation, and entirely avoided the bitter controversies which wrecked so many of the parishes around him. Having built the parish up until it became one of the most active and influential, as well as one of the most prosperous, in the entire diocese, he could well afford to leave it for a wider field of usefulness, although greatly to the regret of those who had known him so long and learned to love him so well — a regret which his present parishioners can thoroughly understand and appreciate. A courteous gentleman of refined manners, earnest and sincere in his work, kindly and sympathetic with all who come in contact with him, learned and eloquent in the pulpit, fearless in his denunciation of the wrong and in his advocacy of the right, he makes a deep and abiding impression on all who are brought within the sphere of his influence. Unlike many of the clergy of the day, he makes no attempt to belittle or deny the scientific discoveries of the age, but frankly admits every fact that is susceptible

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of proof. He acknowledges no controversy between religion and science, but claims that they are perfectly reconcilable and strives to show their absolute and entire harmony. The facts of science must correspond with the truths of revelation, and his sermons upon this subject have been some of the most thoughtful and valuable ever delivered in a metropolitan pulpit. It is beyond question that the scientific infidelity of the day must be met—if it is to be met and conquered—not by evasion or half-denials, but by boldly confessing the *facts* upon which it rests and by harmonizing those facts with the statements of Scripture. To do this successfully, the champion of Christianity must be a scientist as well as a theologian and in both of these branches of learning Dr. Shipman has been a wide and careful student. Under such leadership, the historic parish of Christ Church is rapidly regaining her ancient power and usefulness.

In the fall of 1885 the vestry adopted a resolution to the effect that in their opinion it was desirable to remove the church to some point farther up-town, and appointed a committee of three of their number to examine into the subject and report at a special meeting. Such meeting was held on the 6th of June, 1886, when the committee reported that a piece of property on the northwest corner of Broadway and 71st Street was in their opinion exceedingly advantageous for the purpose, and could be purchased for about eighty thousand (80,000) dollars, but that no offer had been made for the property at Fifth Avenue and Thirty-fifth Street, which the committee considered it desirable to accept. Under these circumstances the corporation was unable to

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make the purchase, but three of the members of the vestry generously offered to buy it themselves and hold it, with the understanding that if the church should be in a position to take it within a reasonable time, they would sell it at cost. But the reasonable time elapsed before the sale of the old edifice could be accomplished, two of the purchasers had parted with their interest to the third, and he was under no obligation, moral or equitable, to carry out the original understanding when the Fifth Avenue property was sold in May, 1888. But this gentleman was most anxious to promote the welfare of the parish, and when it was represented to him that no location for the new church so desirable and so advantageous as the site it now occupies could be found, he very generously at once proposed to transfer the lots to the corporation for their actual cost to him, although the property had then very largely appreciated in value. This noble gift, for such it really was, enabled the vestry to carry out their views and to proceed at once to make preparations for the erection of the new building. In the following October the architect was appointed, plans and specifications approved, and the work of excavating for the foundation begun. In March, 1889, the contract for the building was made, and the work proceeded to its completion in 1890, on the 18th day of May, in which year the first service was held in the new church.

But the rapid growth of the neighborhood soon proved that the accommodations provided were inadequate for the demand, and the seating capacity of the building must be enlarged. In the spring of 1892 the vestry decided to erect

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an apse at the east end, flanked by towers, which would at once add to the architectural beauty of the church, and increase the number of pews. At the same time, it was determined to build a rectory on land owned by the corporation in the rear of the church. Both of these very desirable additions have been completed, and with them the old parish has now a home suited to its needs, and finds itself at the completion of the first century of its existence in a position to carry into effect the most enthusiastic dreams of its early promoters.



TICONDEROGA AND CROWN POINT

A PAPER READ AT A BUSINESS COURT OF THE SOCIETY
OF COLONIAL WARS IN THE STATE OF NEW
YORK HELD ON NOVEMBER 19TH, 1900



TICONDEROGA AND CROWN POINT

Your Excellency and Gentlemen of the Society:

TO properly appreciate the strategic value of Ticonderoga and Crown Point, and the underlying cause of the numerous battles which have been fought for their possession, it is necessary to consider the physical geography of that section of the country. In the days before railroads or even long communicating roads were thought of, when the path from one of the scattered settlements to another was usually only an Indian trail through the woods, the rivers and other water ways were necessarily the most usual and convenient routes for travel and commerce, and for that reason, an Irishman is said to have remarked, Providence placed all the large rivers near the great cities of the world. The advantages of the route of which Ticonderoga forms a link were early recognized. Thomas Pownall, the English Governor of New Jersey in 1735, tells us in his "Reminiscences" that the Indian name of Lake Champlain signifies "the lake that is the gate of the country." Cadwallader Colden, then Surveyor General of the Province, in a report addressed to the Honorable George Clarke, the Lieutenant Governor, under date of February 14, 1737-8, says "the Province of New York has for the conveniency of commerce advantages by its situation

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(sic) beyond any other colony in North America. For Hudson's River, running through the whole extent of this Province, affords the inhabitants an easy transportation of all their commodities to and from the city of New York. From the Eastern Branch there is only land carriage of sixteen miles to Wood Creek, or to Lake St. Sacrament, both of which fall into Lake Champlain, from whence goods are transported by water to Quebec." The name of Lake St. Sacrament, or Horicon as it was called by the Indians, was changed by Sir William Johnson, who writes to the Board of Trade in London under date of September 3, 1755, in the beginning of the French and English Wars, "I am building a fort at this Lake, where no house was ever before built, nor a rod of land cleared, which the French call Lake St. Sacrament, but I have given it the name of Lake George, not only in honor to his Majesty but to ascertain his undoubted Dominion here. When the Battoes (certain small boats so called) are brought from the last fort I caused to be built at the Great Carrying Place about 17 miles from hence, I propose to go down this Lake with a part of the army, and take post at the end of it about 50 miles from hence at a pass called Tionderouge (sic), about 15 miles from Crown Point, and there wait the coming of the rest of the army and then attack Crown Point." The Richelieu River connecting Lake Champlain with the St. Lawrence is about 80 miles long. Lake Champlain, varying in width from 40 rods to 14 miles, is 126 miles in length, Lake George from three-quarters of a mile to 4 miles in width, 36 miles in length, and the Hudson River from Glens Falls to its mouth about 190 miles. A magnifi-

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cent and unrivaled water-way of more than 400 miles, broken only by the carry from Glens Falls to Lake George, was thus provided from north to south, and the importance of cutting this road in time of war, and preventing the passage of hostile forces, was apparent even to the savage mind. The narrow channel connecting the two lakes at Ticonderoga at once suggested itself as a spot to be fortified, and it was so utilized by the Indians, but the requirements of more civilized warfare and weapons of greater carrying power than bows and slings demanded the occupation of an outpost in the vicinity, where a fortress well protected from an enemy's fire could be erected, and such a place was found at Crown Point, on a bluff at the end of a long peninsula projecting into the lake, easily defensible at its narrow land end, and where permanent works would form a valuable adjunct to the position at the junction of the lakes. The French erected a fort called Frederick at this point as early as 1731, and in every war in this part of the country since that time the fate of these two positions has been involved. It would test your patience too severely to recite all the conflicts which have there taken place, so I shall leave for our brethren of the Sons of the Revolution the consideration of the events which concern them, and confine myself to the history of the three occurrences commemorated by the tablet erected by this society on the battlefield near the old French lines on the 14th of June last.

The battle of July 30, 1609, between Champlain, the Hurons and the Algonquins on one side, and the Iroquois on the other, is described by Champlain himself in his *Voyages*

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de la Nouvelle France, published in Paris in 1632, extracts from which are contained in the Documentary History of New York. On the 2d of July in that year he started up the rapids of the Chambly, now the Richelieu, accompanied by a total force of sixty men in twenty-four canoes; how many of these were savages and how many of his own people he does not state, but there were evidently several of the latter. On the 4th he entered the lake which bears his name, where he was impressed by the beautiful islands near its southern end, formerly inhabited by the Iroquois, but abandoned on account of the state of war then existing between the different tribes, and the abundance of trees and vines. They moved slowly up the lake without the occurrence of any special incident until the 29th, when about ten o'clock at night, near if not at Ticonderoga, they encountered a war party of Iroquois. Both companies began to shout, the strangers withdrawing to the shore, and the explorers backing into the lake and tying their canoes together to avoid the risk of separation. With quite the courtesy of mediæval knights, messages were exchanged, an agreement made to defer the combat until the next morning, as it was then too late and too dark to fight satisfactorily, and the opposing forces spent the rest of the night in exchanging insults and taunts with each other, "such as, the little courage they had; how powerless their resistance against their arms, and that when day would break they would experience this to their ruin." The confusion of pronouns is the *Sieur de Champlain's*, not mine, "Ours likewise did not fail in repartee; telling them that they should witness the effects of arms they

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had never seen before; and a multitude of other speeches such as is usual at the siege of a town." This last statement suggests some curious reflections as to what a siege must have been in the good old days.

After daybreak the invaders landed, and the Iroquois, some two hundred strong, left their barricade led by three chiefs, and marched with slow and dignified steps to meet them, doubtless expecting from the disparity of numbers to win an easy victory. Up to this point the entire proceedings seemed to have been conducted with the utmost propriety and decorum and quite in accordance with the rules of chivalry. But here we must hesitate to praise. The allies of Champlain pointed out to him the three chiefs bearing lofty plumes and urged him to kill them if possible, advice with which he willingly complied, for, as he states, he was very glad to encourage his friends and manifest to them his good-will. The two forces paused about fifty paces from each other, Champlain being some twenty paces in advance of his party, armed with an arquebus into which he had put four balls. With this somewhat unfair advantage in his favor, he waited until the enemy prepared to shoot their arrows, and then fired at the chiefs, killing two and wounding one of their companions fatally. Flights of arrows from both sides followed, but the Iroquois were already greatly alarmed at the sudden and incomprehensible death of the two chiefs, for they doubtless saw and heard firearms for the first time, and as while Champlain was reloading, one of his companions fired a shot, the battle was ended. The astonished Iroquois fled in dismay, abandoning their field and fort and throwing

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away the weapons which only impeded their flight, which were afterwards collected by the conquerors. Several others were killed, and ten or twelve prisoners taken, but no wounded, as these were carried off by their friends. Of Champlain's party fifteen or sixteen were wounded by arrows, but all recovered. The victory was complete, and was followed by the proceedings usual on such occasions among warriors whether savage or civilized, the plundering of the deserted camp, and the celebration of the event by feasting, dancing, and singing. "The place where this battle was fought," says Champlain, "is in 43 degrees some minutes latitude, and I named it Lake Champlain."

A very different spectacle was presented in the same month, nearly one hundred and fifty years later, when British Regulars and Colonial Provincials assembled at the head of Lake George in "all the pomp and panoply of war," for an attack upon the French position at Ticonderoga. The war between the French and the English had so far resulted decidedly in favor of the former, who were extending their lines and encroaching upon the British territory in every direction. The inhabitants of the colonies were deeply incensed at what they considered the indifference and carelessness of the home authorities in failing to give them proper protection, and the Government had at last been aroused to the necessity of taking some active measures.

A plan of campaign was formed of which the capture of the French position at Ticonderoga and a descent upon Montreal were the leading features, and General James Abercrombie, who had succeeded the Earl of Loudon as

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Commander-in-chief of the British forces in North America, upon the return of Pitt to power, determined to lead the expedition in person. Not, apparently, having full faith in his capacity, Pitt, in the hope of providing against failure, selected for second in command Lord Howe, who was given the rank of Brigadier General, and became the active controlling spirit of the undertaking. He has been described as "Lord George Augustus Howe — the leading Englishman in America at that time — the grandson of King George I — the special favorite of William Pitt, Prime Minister of England — the idol of the army and beloved in England and America."

Abercrombie was a far different character. Vain of his authority, and anxious to show his contempt for the Provincials, his first act was to promote discord among the troops by announcing that all the regular officers would outrank those in the Provincial service of the same grade. The natural result was that animosities arose, many of the men deserted, and some officers were on the point of resigning their commissions and retiring from the service. Abercrombie was compelled to yield the point and agreed that the regulars should remain and do duty in the forts, while the Provincials under their own officers advanced against the enemy. The bitter jealousies and enmities then created had strong influence a few years later in the strife which began at Lexington and ended at Yorktown.

Before describing the expedition against Ticonderoga, let us see the character of the place to be attacked. Du Quesne advised the construction of works at that point in the summer

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of 1755, and the duty was entrusted to Lotbinière, an engineer of the Province. The original fort was square, with four bastions built of earth and timber, and was the foundation of Fort Carillon. It is not known at what time the stone works whose ruins still remain were erected, but in the year 1758 the French were energetically engaged in enlarging and strengthening the fort, as at that time Crown Point, on account of its less favorable position, and the dilapidation of Fort Frederick, seemed to them of secondary importance. The position held by Montcalm, who was in command of the French forces, "was a narrow and elevated peninsula, washed on three sides by deep waters with its base on the western and only accessible side. On the north of this base the access was obstructed by a wet meadow, and on the southern extremity it was rendered impracticable to the advance of an army by a steep slope extending from the hill to the outlet. The summit between these two points was rounded and sinuous with ledges and elevations at intervals. Here and about half a mile in advance of the fort Montcalm traced the line of his projected entrenchment. It followed the sinuosities of the land, the sections of the work reciprocally flanking each other." At the time of the battle these entrenchments were from eight to ten feet in height, constructed of logs, and in front of them for a distance of one hundred yards trees were felled and laid with their branches outward.

On the morning of the 5th of July, 1758, the head of Lake George presented a magnificent spectacle. Around the ruins of Fort William Henry were assembled seven thousand

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British troops of the line, and about ten thousand Provincials, including the best and bravest of both, with the attendant hundreds of non-combatants, forming the finest army up to that time assembled on the Western Continent. For their transportation to Ticonderoga a flotilla was organized, consisting of nine hundred bateaux and one hundred and thirty-five whale boats, together with a number of rafts to carry the heavy stores, ammunition, and artillery. On a beautiful clear day this imposing pageant swept down the lovely lake with the sound of cheerful voices, the rolling of the drums, the exhilarating blare of the trumpets, and the weird screech of the bagpipes of Lord John Murray's Highlanders. The landing was effected at noon of the following day in a cove on the west side of the lake. Here the troops formed in four columns and began the advance, without, however, their artillery and heavy baggage, which had to be left behind until the bridges which had been burned by the advance guard of the enemy in their retreat could be rebuilt. Abercrombie's intention was to hurry forward and carry Ticonderoga by storm before the arrival of re-enforcements which were supposed to be hastening to Montcalm's relief. But the dense woods and tangled underbrush rendered progress slow and uncertain, and in the general confusion the advance guard encountered a body of the enemy under De Trepézée, who had lost their way. In the skirmish which followed Howe fell at the head of his men, and the utter route of the French party was but small compensation for the loss of the brilliant leader. A solitary barge, in striking contrast with the brilliant display of the preceding day, is said to have borne his

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corpse back to Fort William Henry, whence it was taken to Albany for interment in St. Peter's Church, while it is also stated with equal persistency that his body was buried on the field of battle, where his remains are said to have been discovered a few years ago. "The death of Howe paralyzed the army. With him expired its spirit, its confidence and hope; all afterwards was prompted by imbecility, indecision, and folly." Abercrombie withdrew his army the next morning to the landing-place, but while he was hesitating, Colonel Bradstreet with Rogers and some four hundred rangers, pushed forward, rebuilt the bridges and took possession of some sawmills which the French had erected at the lower rapids about two miles from Ticonderoga. Thus encouraged, Abercrombie moved his army to the sawmills and sent forward his engineer, Clerk, and John Stark, who was with the Provincial troops, to examine the enemy's works. The party returned at dusk, and Clerk reported that the works would offer only feeble resistance to a charge of the British bayonet, but the more experienced Stark was of a very different opinion. His advice was rejected by the General as that of an ignorant Provincial, unacquainted with British prowess, and orders were issued, early on the morning of the 8th, to advance without artillery and carry the enemy's works at the point of the bayonet.

It is asserted that it was Montcalm's intention to evacuate Ticonderoga without awaiting an attack, as he thought it untenable, and that he did not decide upon a vigorous defense until the morning of the battle. His entire force of fighting men was two thousand nine hundred and ninety-two,

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and of these four hundred and fifty were irregular troops, who occupied the abattis in front of the works. De Levis was placed on the right with three regiments, — De Boula-marque held the left with an equal force, while Montcalm occupied the centre with three battalions. The declivity towards the outlet was guarded by two companies. Behind each battalion was stationed in reserve a company of grenadiers. Work on the entrenchments was resumed at daybreak, but at the preconcerted signal (an alarm gun), the troops left their labors and assumed their respective stations under arms. Montcalm threw off his coat, and, forbidding his men to fire a musket until he should give the word, calmly awaited the approach of the enemy.

It was not a battle, but a massacre. Entangled in the trees, confronted by lines of works too high to climb, subjected to a withering and murderous fire from swivels and muskets, the troops held their ground with determined valor. "But," says Mr. Smith, in his history of Essex County, "they heard no command to retreat, — they had received their orders to advance, and although they could not surmount the works they could die in front of them. . . . The assault was hopeless from the beginning, and while its bloody scenes were being enacted under the watchful eye of the brilliant French general, Abercrombie looked after the welfare of his noble person amid the security of the sawmills two miles from the battlefield." After enduring the enemy's fire without flinching for five hours, the troops retreated in the utmost disorder, having lost in killed and wounded nineteen hundred and sixty-seven men.

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The British had still some twelve thousand men with plenty of artillery, but their general was thoroughly alarmed, and retreated during the night to the landing, leaving orders for the army to follow him there. On their arrival the next morning, this army of lions, led by a stag, was seized with a sudden panic and would have rushed into the bateaux and sunk many of them, had not Colonel Bradstreet by his coolness and presence of mind prevented such a disaster. Abercrombie, it is said, did not breathe freely until Lake George was between himself and the enemy, and his artillery and ammunition fairly on the way to Albany. That pursuit did not follow was due to the feebleness of the enemy, and the impracticability of traversing the forest without Indian guides, which Montcalm did not have. De Levis went over the track of Abercrombie's army on the morning of the 10th, and found only the vestiges of a routed host.

"Abercrombie returned to England," says Bancroft, "evaded censure; was gladdened by promotion, and lived to vote as a member of parliament for the taxation of a country which his imbecility might have lost, and which was always the object of his malignant aspersions."

The decisive blow was struck the next year by a very different man. General Amherst, who had captured Louisbourg on July 16, 1758, learning of the fatal issue of Abercrombie's campaign, with an unwonted ardor, without waiting for orders, embarked four or five regiments and sailed with them to Boston. On his arrival he at once commenced a march through the forest to Lake George, which he reached in person in October. In November he assumed command,

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Abercrombie having been recalled, and he appointed Commander-in-Chief.

Of him, Watson in his history of Essex County says, "Amherst, without any claim to brilliancy or genius, was calculated to command success by the excellence of his judgment, his prudent circumspection, and persevering firmness. His character and policy had secured to him the respect and confidence of the colonies. His measures were not stimulated by the arrogance of Braddock, nor trammelled by the feebleness and indecision of Abercrombie, nor dishonored by the pusillanimity of Webb."

As the season was too far advanced for active operations when Amherst received his promotion, it was not until in May of 1759 that he began his preparations at Albany, obtaining boats, gathering stores, and drilling the new recruits. He reached Lake George with an army of about eleven thousand men in June, and late in July it moved down the lake in four columns, in a fleet of whale boats, bateaux and artillery rafts, and left the boats nearly opposite the former landing-place. The army advanced rapidly on the road to the falls, meeting and scattering after a short skirmish a force of French and Indians, and the main body took a position at the sawmills. From prisoners captured it was learned that Montcalm was at Quebec, where that gallant officer met a soldier's death on the 13th of September following, and that Boulamarque commanded at Ticonderoga with thirty-four hundred men. The French withdrew into the fort, and made a show of resistance for several days while they completed their preparation for evacuating the position.

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During the night of the 25th of July an explosion took place and the light of the burning works showed the retreat of the French. Colonel Haviland pursued them down the lake with a few troops and took sixteen prisoners together with some boats laden with powder. Amherst slowly prepared to attack Crown Point, and sent Rogers with his rangers to reconnoitre. But on the 1st of August they learned that the French had abandoned that fort, and on the 16th that Boula-marque with his troops was encamped at the Isle au Noix at the northern extremity of Lake Champlain, commanding the entrance to the Richelieu. The final conquest of Ticonderoga and Crown Point was achieved with only the loss of Amherst's Adjutant General Townsend, a brilliant officer, and about eighty men.

The long struggle was ended. The fall of Quebec the next month left the French in possession only of Montreal and Detroit and a few scattered posts along the frontier, and these last traces of dominion vanished the next year, with Amherst in Montreal and Rogers in Detroit. From the bay where Hendrik Hudson moored the little *Half Moon*, throughout the length of the lordly river to which he gave his name, across the carry to the lovely lake which testifies to Sir William Johnson's loyalty to his royal master, passing the gateway of Ticonderoga into the great inland sea which Champlain discovered and explored, through the winding channel of the Richelieu to the St. Lawrence, and down its broad pathway to the sea, the lilies of France were forever submerged beneath the waters, and the crosses of Great Britain everywhere floated in triumph.

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A PAPER PREPARED AT THE REQUEST OF THE
COLONIAL ORDER OF THE ACORN, DESCRIPTIVE
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THE picture presented to us shows little with which we are familiar on either side of the river. The fishermen on the Long Island shore would now find small opportunity to pursue their vocation in front of the warehouses, amid the puffing tugs and steamers and beneath the lofty bridge which occupy the then vacant space, while their vision would be surprised by the equally impressive towering buildings and massive wharves which have replaced the old structures of New York. Even the few church spires which then formed such prominent features of the landscape, and which still remain in the lower part of the city, are so dwarfed by their surroundings as to be barely discernible. But at this time these were so conspicuous as to be the first objects to attract our attention. First and most obvious to the sight is Trinity Church at the head of Wall Street, its steeple dominating all the others, being on the building erected in 1788 to replace the one destroyed by fire during the Revolution, to be in its turn taken down to make room for the present stately edifice consecrated in May, 1846. The spire next on the right I imagine to belong to the Presbyterian Church in Wall Street, near Broadway, which was built in 1719 and enlarged in 1748. Rebuilt on a greater scale in 1810, it was destroyed by fire in

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1834, restored the following year, and occupied until 1844, when it was taken down, the congregation having acquired a new site on Fifth Avenue, between Eleventh and Twelfth streets, which it still occupies. Immediately to the north of the Wall Street Presbyterian Church stood the Scotch Covenanters Church, on the south side of Cedar Street, and its steeple is probably the northerly one of the three clustered together, but the latter may be that of the Middle Dutch Church on Nassau and Cedar streets, on the ground now occupied by the building of The Mutual Life Insurance Company of New York. Next, to the right, appears the spire of the North Dutch Church, completed and opened for public worship on May 25, 1769, a fine stone building measuring 100 feet by 70, on the corner of William and Fulton streets. Almost up to this time the services in the Dutch Reformed Churches had been held in the mother tongue, but the increasing use of the English language had become so marked, especially among the younger people, that it became necessary to make a change, and in 1764 English was used in the Middle Church, to the great wrath of the elderly conservatives. Dutch, however, continued the language in the South or Garden Street Church until 1803.

Passing on to the right, the next tall spire is that of St. Paul's Church, erected in 1766, where, during the days of the English occupation of the city, Major André, Lord Howe, and Sir Guy Carleton attended the services, and with them the English Midshipman, who afterwards became William IV. Immediately after his inauguration as first president of the

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United States, Washington, together with all the civil and military dignitaries who had graced the occasion, repaired thither for public worship, and during his residence in the city he retained a pew there and constantly attended the services. It has frequently since been the scene of stately ceremonies, not the least imposing of which were the funeral services held under the auspices of the Sons of the Revolution in honor of the late President McKinley on the 18th of September last.

The eye rests next upon the Brick Church then standing at the corner of Beekman and Nassau streets, upon ground which is now partly occupied by the building of the *New York Times*, and which was built in 1768 in the fields and quite out of town. During the Revolution it was used as a hospital, but restored to ecclesiastical purposes thereafter and continued as a place of worship until 1854, when the congregation removed to their present building at the corner of Fifth Avenue and Thirty-Seventh Street. It remained for years a branch of the Presbyterian Church in Wall Street, and the formal separation and its erection to the dignity of an independent church did not occur until 1809.

Last on our list towers the spire of St. George's Church, on the Chapel Hill at the corner of Beekman and Cliff streets, built in 1748 as a chapel of Trinity Church, and made an independent organization in 1809. In 1846 Mr. Peter G. Stuyvesant gave the church some lots of ground on Rutherford Place and Sixteenth Street, sufficient for a new church and rectory, and the parish erected buildings on that site which it still occupies.

This brief review of the church steeples shown in our picture makes it clear that our fathers did not lack opportunities for religious instruction and worship, and justifies the remark of Mr. Felix Oldboy when he terms the New York of that day "the paradise of churches."

Having considered the ecclesiastical buildings with sufficient fulness we may properly turn our attention to the more worldly features of the landscape, but I cannot attempt with any confidence to identify the other buildings shown. I am inclined to think that the high roof, to the right of Trinity and the two other steeples, covers the new City, afterwards Federal, Hall, which stood on the north side of Wall Street, opposite Broad Street, extending across what is now Nassau Street, but I do not venture to speak with certainty. Fraunce's Tavern, the City Hotel, the Tontine Building, the Golden Hill Inn, and many other landmarks of the old city, are doubtless there but cannot be recognized. South Street had not then been reclaimed from the river, and Water Street was the city's front on the East side — along it was extended the shipping of the port, as the North River, with its width and direct continuation of the bay, was thought to afford only an unsafe and hazardous anchorage. Along the wharves from the Battery to Peck Slip the ships lay at the wharves, or at anchor in the river, and above were the shipyards, then scenes of busy industry. Here and there were receiving docks, as at Coenties Slip, Wall Street, and Maiden Lane, which were afterwards filled up to make the broad spaces which are now found at the foot of those streets. The Fly Market, so called, a corruption of V'lei or Valley, from a

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stream which ran through Maiden Lane, the favorite location for the laundry work of our mothers, consisted of three market houses on that street, extending from Pearl Street to the river, and from the slip connected with it a ferry ran to Brooklyn.

Before passing to the consideration of the general condition of the city at that time, our engraver deserves a moment's attention. "Engraving," says Gen. James Grant Wilson, in his *Memorial History of the city of New York* (Vol. IV, p. 357), "did not antedate sculpture in its artistic and technical development, although a number of engravers, most of them foreigners, began to practise their calling in this city in the last decade of the Eighteenth Century," and among the names he mentions as prominent in the art at that time is that of William Rollinson, by whom the engraving before us was made. The artist who prepared the drawing, John Wood, has not handed down his fame to posterity in any other work than this, so far as I can ascertain. The plate is most accurately and artistically engraved and will bear the closest examination under the most powerful glasses.

The city of our homes and our love arose from the destruction of the Revolutionary period like a phenix from its ashes. With her population scattered, her commerce destroyed, most of her buildings burned, ruin and desolation on every hand, she went to work with undaunted courage, unrivaled energy, and far-seeing sagacity, immediately upon the withdrawal of the British troops in 1783, to rebuild the Metropolis of the West. The fact that she became the seat of the new government was unquestionably a strong factor in her favor, and in

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1801 she had already acquired a population of between fifty and sixty thousand. An estimate of the funds required for the support of the city's institutions for the year 1800, which has been preserved by General Wilson, gives us a good idea of the responsibilities the city authorities of those days had to bear, and forms a marvelous contrast to the budget of the present city. For the almshouse the sum of thirty thousand dollars was needed, an amount which seems disproportionately large, and which may have been in some degree attributable to the losses incurred in the Revolution by those who were too old or too helpless to restore their fortunes. For the Bridewell or Workhouse five thousand dollars was required, and for the support of the prisoners three thousand dollars was appropriated. In view of the cost of our present police system, the maintenance of the watch for twenty-five thousand dollars seems idyllic, as does an appropriation of five thousand dollars for streets. To this list must be added other items which seem properly to belong to the same subject, such as lamps to cost fifteen thousand dollars for being kept in order and lighted on nights when there was no "light moon," and wells and pumps, for fire and domestic purposes, for which twenty-five thousand dollars were needed. The Manhattan Company, which had been chartered the year before, had already gone into the banking business under its charter, but had done very little in the line of its ostensible purpose of supplying the city with fresh water. For roads about the city seventy-five hundred dollars were appropriated. But even in those days, which so many people who know little about them consider purer and better than these so far

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as politics and politicians are concerned, our predecessors showed their appreciation of the advantages to be derived from the useful application of money by making appropriations for "Contingencies" of twenty-nine thousand four hundred and fifty dollars, and for "City Contingencies" of seventy-five hundred dollars, moneys doubtless intended to be applied where they would do the most good, as the contingencies might arise.

The city then occupied only the lower end of the Island. The Battery was the favorite promenade. Many of the prominent merchants lived along State Street and in Pearl Street over their stores. The banks and financial institutions were in Wall Street, where also resided many of our ancestors, and their wives went shopping in William Street.

The only theatre was the one on Park Row, between Ann and Beekman Streets, called the Park Theatre, which was opened in 1798, and there appear to have been no other public amusements. There was much social life, but considering the proportion of the number of churches to the population, these must have afforded the principal opportunities for social gatherings. I have enumerated those conspicuous by their steeples, but there were many others, such as the Garden Street (or Exchange Place) Church, Grace Church on the corner of Rector Street and Broadway, where the Empire Building now towers, the French Church in Pine Street, Christ Church in Ann Street, and St. Peter's in Barclay Street built in 1786, the home of the oldest Roman Catholic congregation in the city.

I can find no words to conclude this brief sketch better or

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more appropriate than those used by the President of the United States in his "New York," pp. 166-167. Says Mr. Roosevelt, speaking of this period, very characteristically, "the divisions between the upper, lower, and middle classes were sharply marked. The old families formed a rather exclusive circle, and among the large land owners still claimed the lead, though the rich merchants, who were of similar ancestry, much outnumbered them, and stood practically on the same plane. But the days of this social and political aristocracy were numbered. They lost their political power first. . . . The fall of this class, as a class, was not to be regretted, for its individual members did not share the general fate, unless they themselves deserved to fall. The descendant of any old family who was worth his salt still had as fair a chance as any one else to make his way in the world of politics, of business, or of literature; and according to our code and standard, the man who asks more is a craven."



MYSTERIOUS DISAPPEARANCES AND
PRESUMPTIONS OF DEATH
IN INSURANCE CASES

PAPERS READ BEFORE THE MEDICO-LEGAL
SOCIETY OF NEW YORK



MYSTERIOUS DISAPPEARANCES, AND PRESUMPTIONS OF DEATH IN INSURANCE CASES

PART I

IN looking over the titles of the papers which have been read from time to time before this society, I observe that it has exercised a most catholic toleration towards their authors, and allowed them to treat of any subject which appeared to be even remotely connected with the object of its existence. An especially favorite topic seems to have been suicide, and the always interposed plea of insanity in life insurance cases; and with that fact in view, I do not feel that I am asking too much indulgence when I invite your attention to another class of frauds perpetrated upon companies engaged in that business; and even if my discourse is not sufficiently profound to entitle it to rank with the many able and thoughtful papers which have been read before this body, it is well to remember that the bow of Apollo was not always stretched, and that it is good sometimes to unbend, and waive instruction in favor of entertainment.

Before entering upon my subject, permit me for a moment to advert to the unreasonable nature of the charge now so frequently made against life insurance companies, that they seize every pretext to resist the payment of a claim; and

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complaint is especially made, that after receiving premiums for years they will, when death occurs, object that some false statement has been made in the application which avoids the policy. To the careless and unthinking such conduct does appear to be reprehensible, and it would seem at first sight that companies should make their initiatory examination so rigid and thorough, that after the applicant has once been accepted, a policy issued to him, and his premiums regularly paid and received for a series of years, they should be concluded by their action, and estopped from raising any question as to the physical or moral condition of the insured at the time of the examination. So attractive is this idea to those who have merely glanced at the superficial aspect of the question, that the legislature of a Western State, a few years since, solemnly enacted that after a policy had been issued on a life, and the premiums regularly paid for three years, no defense should be interposed by the company in an action on the policy on the ground of misrepresentations made in the application. Unfortunately for the object which these modern Solons had in view, their respect for the principles of the Common Law compelled them to add, *except in cases of fraud*, and as that defense would be made by a company only in such cases, the statute avoids itself. The constitutional prohibition of the enactment by any State of an act impairing the obligation of contracts would probably render such a statute worthless; but the one thus cited is curious as showing the endeavor of the legislators to remedy what they considered a wrong, and yet what they were obliged to confess that they considered a right. For the insurer of a life stands in a very

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different position from him who insures a house; the latter may examine his risk carefully and thoroughly — he may measure its distance from adjoining buildings, the nature of the walls between it and them, the internal supports, the arrangement of the heating apparatus, the character of the roof, the probability of total or partial loss in case of fire, the efficiency of the department on which he must depend for the extinction of a conflagration, the nature of the business carried on in it and adjacent buildings, and every conceivable element which enters into the calculation of his risk. They are all existent patent to his investigation, and it is his own fault if he does not enter into his contract with a clear and perfect understanding of the risk which he assumes. With the insurer of life the case is very different. Certain elements of the calculation are of course within his reach. He can estimate properly the influence of the climate in which the proposed life dwells, the hazard of his occupation, the especial diseases to which his locality is exposed, and the average length of human life. From all these facts he can deduce a table of life which will enable him to rate exactly the cost of insuring the theoretical man. But when he comes to carry his theories into practise, he has in reality no means of ascertaining whether the life proposed reaches the average standard, but from the statements made to him by that proponent. The medical gentlemen who honor me with their attention know very well that there may be inherited or even acquired tendencies toward certain diseases, which no physical examination will detect, and against which the insurer can be warned only by a true and accurate family history. The

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tremendous influence over the question of life or death which is wielded by such tendencies, by habit, by temperament, is an important factor in every calculation upon a single life, and cannot be properly estimated unless every circumstance or fact which the insurer desires to know is stated to him fully and accurately. I have in my mind at this moment a case in which the applicant for insurance presented a clear, unquestionable record. One sister had died of yellow fever — it was true, but he omitted to add that, had the fever spared her, she would have died of consumption within six months. Another sister died of suppressed menses — it was also true, but he omitted to state, that vicarious menstruation ensued from the lungs, and caused her speedy death. So with several other members of his family, who, with well developed phthisis, had actually died from other causes. The applicant himself was apparently sound, and physical exploration failed to discover any symptoms of disease, yet his death within a year from consumption showed that he must have had strong tendencies towards that disease, and investigation developed the facts I have detailed. As is usual in such cases no ground of suspicion was presented until the death occurred. Then the very fact of such a death showed that misrepresentations must have been made, and not until suspicion was thus aroused was such an investigation deemed desirable. It is practically impossible to verify at the outset every statement made by an applicant for life insurance, and as he knows, and from the nature of the case must know, the truth or falsity of what he alleges, it is only just that those claiming under him should be bound by his representations.

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If his death occur from a cause or under circumstances inconsistent with his statements, the insurer is, for the first time, informed that those statements were false, and is justified, both in law and in good morals, in resisting a demand based upon a contract into which he was led by the misrepresentations of the contracting party upon whom he relied.

Yet, when we consider the magnitude of the business of life insurance in this country, it is suprising to see how few cases are contested compared with the immense number which are paid without a question, although many of the latter are doubtless tainted with fraud.

From the last report (April, 1875) of the Insurance Superintendent of this State, I find that fifty American companies reported to him in detail their business for the previous year. During that period these companies returned to their policyholders in payments for death-claims, and lapsed or surrendered policies, over forty-eight millions of dollars, while the entire amount reported as in litigation was but little over one million. That is to say, the total amount of claims disputed for every cause, and many of which had been pending for years, was only a trifle more than two per cent of the sum paid to their customers in a single year. The bare statement shows the absurdity of the pretense that these companies *prefer* to dispute claims upon them, and it may fairly be added that no solvent company ever resists a demand willingly. No matter how just the resistance may be, or how bare-faced the fraud which may be attempted, the fact of the resistance is all that strikes the popular attention, and it is made a handle for attack and abuse. Were it not that the officers

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of these companies are usually honorable and high-minded men, who properly appreciate the sacredness of their trust and their duty to their honest policy-holders, we should hear nothing of contested claims, and a grand field would be open to modern rascality.

It must be noted that this statement of litigated claims includes every variety of demand, from that based upon a doubtful point of law to that resting upon the most outrageous fraud.

If this digression has answered no other purpose, I trust it may have shown that while life insurance companies are extremely averse to litigation, they are peculiarly exposed to frauds, and prepared the way for the consideration of the particular class of rascalities to which I invite your attention.

The number of people who live by their wits depends upon the state of civilization of the country in which they exist and increases *pari passu* with the latter. When man, as in his primeval state, is utterly dependent upon his own exertions, and must kill and cook his own dinner or go without it, rogues have no field for their operations; but with the increase of mutual dependency, and the accretion of individual or corporate wealth, comes the opportunity for its fraudulent attainment. With the opportunities which life insurance companies offer for a heavy insurance and a simulated death, it is singular that this field has not been more freely worked, to use the professional slang; yet the few instances I have to detail are all that have been *discovered*, although no one knows how many frauds have escaped detection.

Mr. John Francis, in his entertaining work entitled "The

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Annals, Anecdotes, and Legends of Life Insurance," with all his laborious research has been able to find but two such instances of attempted fraud. The first occurred at Berlin, Germany, in 1848, where a surgeon had been bribed to certify to the death of a person heavily insured, and a coffin filled with stones and rotten straw was solemnly interred with all the religious ceremony and friendly attention appropriate to the occasion. Unhappily for its instigator, the plot was soon discovered and all the parties interested properly punished. The same trick was attempted a few years since, in a Western State, with the same result.

The second case related by Mr. Francis shows rascally genius, and was so well planned that no suspicion was excited and success was achieved. A party of four men in London hired a boat one evening about dusk, just below Blackfriar's bridge, and proceeded for a pleasure excursion up the Thames. While rowing quietly along and not far from shore, the boat was suddenly and apparently without cause overturned, and its four occupants were struggling amid the darkness in the water. Their cries for help were speedily answered by the numerous boats in the vicinity, and three of the party were soon in safety, but the fourth could nowhere be found. Careful search was made without result, and the survivors were loud in their lamentations over the unhappy fate of their dear friend. They were compelled reluctantly to leave the spot where he had been lost, but not before offering a large reward for the recovery of his body. Late that night the same party in a small boat with muffled oars proceeded stealthily down the river, and placed a dead body procured from some hos-

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pital or cemetery at a point on the river bank, where the tide would be likely to throw a corpse drowned at the spot where their accident had occurred. The next morning they reappeared upon the scene, heard with astonishment and delight that the body of their deceased comrade had been found, recognized the corpse at once, and paid with alacrity the reward which they had promised. The Coroner's inquest was held in due form, the accident described, the three survivors identified the body as that of their deceased friend, and a verdict of accidental death was duly rendered. The proceedings with other proper proofs were presented to the company which had a large insurance on the life of the supposititious deceased, and as everything appeared to be perfectly regular, the money was duly paid to the claimant. Not until the parties concerned had the audacity to attempt the same operation a second time was the fraud discovered. The admirers of Mr. Chas. Reade may remember that he has worked this incident into the lives of one of his characters in a recent novel.

An ingenious gentleman in Massachusetts, who had embarrassed his affairs by a long continued series of forgeries, and had become somewhat apprehensive of the result to himself, recently endeavored to solve his difficulties by a mysterious disappearance from a Fall River boat. He was known to have left New York on it, but was not seen the next morning, and on examination his outer clothing was found in his stateroom, but no trace of himself. His life was heavily insured, he was known to be financially embarrassed, and the first supposition naturally was that he had committed

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suicide. Unfortunately for the success of his well-laid plans the victims of his crimes were sufficiently skeptical of his death to secure a large detective force to trace him, and their efforts resulted in his arrest at San Francisco as he was about to embark for Australia. His plan of operation had been very simple — he merely left the suit of clothes he had worn in his stateroom, taking another from his valise, shaved his beard and whiskers, and stepped forth so altered that no casual observer the next morning recognized him as the man they had seen the night before.

More careful construction of a plot and greater attention to details was shown by two men named Shepherd, who concocted a fraud upon three insurance companies some two years since. About the middle of July, 1873, one George Shepherd called at the house of a farmer in Maryland, living near the Potomac River nearly opposite Alexandria, and asked and obtained permission to spend the night. One of the family was a boy of about sixteen years of age, apparently a simple, well-meaning creature, not overburdened with brains, who seemed to Shepherd a fitting tool for the scheme he had in mind. In the course of the evening's conversation he suggested to the farmer, who spoke of his desire for additional help in harvesting, that he had a brother living with him in Alexandria who would be glad to accept a short engagement. The proposal was accepted and James Shepherd entered into the farmer's employ, his brother visiting him almost daily, and thus continuing his own acquaintance with the family. After a week of these preliminaries, James, who had by this time become quite well acquainted with the

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boy already mentioned, proposed to him one evening to go out on the river for a fishing excursion with his brother George, and the two together went to the water, where they found George in a boat. This latter had some peculiarities of construction which are entitled to especial mention. It was an ordinary working-boat, about twelve feet in length, having two seats in the center, but none in the bow or stern. On the latter was fastened a platform which projected out over the water some ten or twelve inches, and almost as much on each side, and a rope ran along the outside of the boat from the bow to the stern, and dragged some additional length in the water. The weather was warm, but George wore a rubber coat over his other clothing. In this boat thus prepared, the party started about dusk, James and the boy each pulling an oar and George sitting in the stern. They stopped twice and anchored to fish, and having consumed the time until it was quite dark, the night being cloudy, the Shepherds proposed to pull up the anchor to go ashore. They were then on the flats between the channel and the shore, the moon was obscured by thick clouds, and the only light visible proceeded from a lighthouse on the Virginia shore opposite to them. On the return trip the position of the parties was somewhat altered: George sat in the bow of the boat, the boy in the centre, pulling both oars, so that his back was towards him and his attention fully occupied, and James on the other seat. Suddenly, as the boat was proceeding quietly without any jar or shock, a splash was heard, James cried out that his brother had fallen overboard, and the boy, turning his head saw him for one brief instant near the boat on the surface of

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the water, beneath which he immediately sank. The two rowed about for some time, and poked with their oars on the bottom of the river, but of course did not find what one of them, at least, knew very well was not there. After fifteen minutes spent in this useless employment, they proceeded to the shore, when the boy was at once sent to a distance to inform a neighbor of the accident, thus giving George an opportunity of coming out from under the stern of the boat, where he had supported himself by the rope, and betaking himself to a place of security. The neighbors were told the story, and urged to search for the body, but the rogues were inferior to their English prototypes in neglecting to procure a corpse to personate the absent one, and no body was ever found. James remained in the farmer's employ for a few days longer, until he had recovered from his grief sufficiently to enable him to take the boy before a notary public in Alexandria, and have him swear to an affidavit detailing the circumstances of the death of George as he understood them, and then he too disappeared from view for a while.

About this time the police of Alexandria became very much exercised about the mysterious movements of some men who appeared to be living in a swamp near the town, and as it was feared that they were plotting burglaries at least, it was decided to effect their capture. A sudden and unsuspected movement resulted in the discovery of the Shepherds' boat, containing two men, one of whom escaped at the first alarm, but the other, who proved to be James Shepherd, was taken prisoner. He was found to be heavily armed, and to have on his person three policies of insurance which had been

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issued by as many companies upon the life of his brother George, and the affidavits of the latter's death made by the boy and himself. In his first fright and alarm he confessed the whole fraud, but subsequently decided to contradict his statements, and to plead not guilty to the indictment which was found against him for perjury in swearing to his brother's death; the event proved his wisdom, for the jury before whom he was tried were unable to make up what they were pleased to call their minds, although several witnesses deposed to having seen George Shepherd since the time of his alleged death, and their disagreement was a virtual discharge for the prisoner. He was so emboldened by this success that he had an administrator of his brother's estate appointed in Richmond, and commenced a suit on the policies in his name. It is needless to add that it is not one which gives the companies interested much anxiety, familiar as they are with the extraordinary vagaries of petit juries.

A very striking instance of the tendency of the average jury to find a verdict against a life insurance company in all cases, without the slightest attention to the law or the facts involved, is afforded by the Goss-Udderzook conspiracy, which reached its final determination year before last, in the execution of one of those parties for the murder of the other. The whole case is so startlingly dramatic and so thrilling in its incidents, that I trust I may be pardoned for dwelling upon it at some length.

In the winter of 1871-2, Winfield Scott Goss was a young mechanic in the city of Baltimore, a man of about thirty-six years of age, of considerable inventive ingenuity, devoting

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much of his time to new mechanical devices, somewhat addicted to intemperance, of superb physique, and, unfortunately for himself and his fellow-conspirators, of conspicuous and striking presence. A good-natured, good humored fellow, not possessing a high order of intellect, rather idle and shiftless, and completely under the control of his brother-in-law, Wm. E. Udderzook, who is the villain of the story. Goss had for two or three years carried a policy of \$5,000 on his life, when the plan was formed to perpetrate a deliberate fraud upon the insurance companies. As the existing policy was hardly a sufficient prize, the first step was to increase the amount, and in December, 1871, Goss applied to other companies for two more policies of \$10,000 each. Being physically an excellent risk, he was at once accepted, and having raised the funds to pay the first quarterly premium on each, he was in possession of policies aggregating \$25,000. His next step was to announce to his friends that he proposed entering upon a series of experiments in the hope of making an artificial india-rubber, and with this ostensible object he hired a small shanty some distance from Baltimore, on the York Road, in a thinly settled neighborhood, where he established his laboratory. On the second of February, 1872, Goss and Udderzook went together in the afternoon to this building as usual, and remained there some time. About eight o'clock in the evening, Udderzook appeared at the door of a farmhouse situated at a distance of half a mile, and begged for a lamp, stating that the one which they had been using burned very badly, and afforded scarcely any light. This request having been complied with, he started to return,

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carrying the lamp and accompanied by a son of the family, whom he had invited to go with him. They had proceeded but a short distance when their attention was attracted by a gleam of light, and on the suggestion of Udderzook that the laboratory must be on fire, they started on a run. Arriving at the building, they found it all in flames, a crowd of people assembled, and some engines from the city on hand and at work. It was soon evident that the building must be entirely destroyed, and then for the first time Udderzook made inquiries for his brother-in-law, and expressed the fear that he had perished in the conflagration. The thought that a fellow-creature might be endangered increased the exertions of the firemen, and in short time the flames were beaten down sufficiently to allow the form of a man to be indistinctly seen amid the ruins. After several unsuccessful efforts, a hook was inserted in it, and it was dragged out smoking and burning. The flesh of the head was entirely consumed, as was the major part of the limbs; in fact, little but the skull, trunk, and a portion of one of the thighs was left. At the coroner's inquest the next day, however, the remains were identified by Mrs. Goss, a brother, Alexander C. Goss, and by Udderzook, who also detailed the circumstances of his leaving his brother-in-law, and supposed that the lamp which they had used had suddenly exploded, setting fire to the building, and burning or otherwise crippling Goss, so that he was unable to escape. The explanation was probable and satisfactory, the verdict was duly rendered, and the weeping widow and mourning friends followed to the grave, with all becoming religious ceremonial, what the coroner's

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jury had certified to be the mortal remains of Winfield Scott Goss.

The proofs of death were duly presented, everything appeared to be entirely regular, and the conspirators believed themselves to be certain of success. But there is always danger of over-doing a job of this character, and that was the error committed in the present instance. The two companies, who had but just issued their policies for \$10,000 each, were naturally annoyed at so large a loss occurring so speedily, and set to work to scrutinize all the facts in the case with the greatest care. The first discovery of importance was that Goss was utterly unable to carry so large an amount of insurance. His income was limited, and insufficient to cover his expenses; he was in debt to quite an extent, and had even been obliged to borrow money to pay the first premiums on his new policies. It was therefore clear that he could not have intended to carry them long, and had obtained them only for some immediate object. This was sufficient to excite suspicion, and the unusual nature of the death added to it. The character of Udderzook was not altogether beyond question, and his conduct at the farmhouse when he went to obtain the light excited the comment of the people there. It appears that he sat and conversed with them for some time before stating his object in coming, and, after he had mentioned it and obtained the light, he still lingered so long that they felt obliged to remind him of the comrade whom he had left in the dark, and to advise his speedy return. This apparently inexplicable delay seemed intended to allow the fire ample time to get well under way before he reappeared.

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Again, his apparent forgetfulness of his brother-in-law on his arrival at the scene of the disaster, and his neglect to make any inquiry for him until it was too late to make any effort to extricate him from his supposed position, tended to show that he did not wish to have the body drawn from the fire until it had been so far destroyed as to render any attempt at identification hopeless. In the endeavor to strengthen his case, he committed a blunder which injured it very seriously. A few days after the catastrophe he produced the watch of Goss which he said he had discovered among the ruins, although these had already been searched by hundreds of curiosity seekers, and nothing of importance found. This watch he swore that Goss had carried on the night of the fire, but while the heat had almost entirely consumed the body, the watch, which was said to have been on it, was not melted nor even tarnished or injured in any way. Careful investigation also showed that on the afternoon of the fire a man supposed and believed to be A. C. Goss, a brother of the insured, had hired a horse and a wagon from a livery stable in the city, and had not returned with it until late in the evening. The theory adopted by all the companies, in view of the facts, was that a body had been procured from some poor-house or cemetery, and conveyed to the shanty in the afternoon; that Goss and Udderzook had together saturated the corpse and building with coal-oil to ensure their destruction; that after the latter had gone for the light, the former had set fire to the house, and then jumping into the buggy held in readiness by his brother, driven to a small station near by, at which the evening train from Baltimore stopped

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and proceeded in that to Philadelphia, while his brother returned with the buggy to the city, and Udderzook wept over the charred remains drawn from the fire. The companies therefore declined to pay the policies, and the widow promptly commenced suit against them.

So far the defense had only conjecture and suspicion to rely upon, and as it was certain that no favors could be expected from a jury, it was most important that positive evidence should be discovered. Photographs of Goss were freely distributed throughout this country and Canada, and every effort made to reach his hiding-place, but without success. He seemed to have disappeared from the face of the earth as completely as if he had really perished in the flames.

In the spring of 1873, as the time of trial drew near and it became evident that Goss could not be found, it occurred to the law officer of one of the companies that, in the absence of any distinctive marks on the buried remains, it might be worth while to examine the teeth. It had been noted that the insured had a remarkably perfect set, and several of the persons examined, in describing his personal appearance, had especially referred to their whiteness and regularity as being extremely noticeable. Personal interviews with over fifty dentists in Baltimore, Washington, and Philadelphia failed to show that any work had been done for him by any of them, and his wife and relatives were all certain that he had never been to a dentist and never had any trouble with his teeth requiring attention. It remained to ascertain whether the corpse had been equally fortunate in an exemp-

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tion from the ill which afflicts so much of humanity, and proper authority was obtained for its exhumation in the presence of competent witnesses. A moment's examination sufficed to show that the dental system of the deceased was an utter wreck, the condition of his mouth being such that his articulation must have been affected, and that no one could have conversed with him in his lifetime without observing the defect. Here, then, was proof positive that the remains found in the burned building were not those of Goss, and with this fact, added to the conjectures already indicated in their possession, the companies went confidently to trial in Baltimore.

All the circumstances of the case were brought out fully on that occasion, much more powerfully and plainly than I have stated them, and impressed upon the jury with all the eloquence and skill which learned counsel could bring to bear; the Judge and all the hearers, except those it was important to convince, were thoroughly satisfied that a great fraud had been committed; but the jury promptly brought in a verdict for the plaintiff on general principles. Of course, a motion was at once made to set it aside, as being against the weight of evidence; and, pending the decision of that question, we may allow the curtain to fall on the first act of our drama.

It rises again to show us, some six weeks after the trial, a distant spot in Chester County, Pennsylvania. A farmer residing near a little clump of trees, known as Baer's Woods, was struck by noticing a large number of vultures hovering over them. Seeing from their manner that something unusual

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attracted them, he had the curiosity to visit the spot where they were congregating, and discovered to his horror that they were feasting upon a portion of a human body, the abdomen of which, thinly covered by a layer of earth and a few leaves, was protruding from the ground. The local coroner was at once summoned, with other neighbors, and a careful examination of the vicinity made. The fragment already uncovered by the vultures proved to be the trunk of a large, full-chested, well-developed man; at a little distance, where a recent disturbance of the earth indicated that other discoveries might be made, were found buried the limbs; and a third hole contained the head and a bloody shirt. The remains were carefully carried to the neighboring village of Jennerville, and conjecture at once set to work to identify the victim and his murderer.

The latter was speedily indicated. Some days before, Wm. E. Udderzook, who had spent his boyhood there, and whose mother still resided in the neighborhood, had arrived there with a friend whom he represented as the traveling agent of a Western firm, and then suffering from *delirium tremens*. The invalid kept himself carefully concealed from observation, while Udderzook made various visits in the neighborhood, and, among others, to another brother-in-law, one Samuel Rhodes, a farmer residing near Baer's Woods, to whom he broached a scheme of securing a large sum of money by making away with a man whom he represented as being already dead to the world, and about whom no inquiries would ever be made. Rhodes having declined this easy method of acquiring wealth, Udderzook decided to execute

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his purpose alone. The next day between 1 and 2 o'clock in the afternoon, being July 1, 1873, he hired a horse and buggy from a neighboring livery-stable, and with his companion drove away in the direction of Baer's Woods. Shortly before midnight he returned alone, and stated that his companion had taken the cars at a station near; and the next morning, after a visit to his mother, he himself returned to Baltimore. As he was well known in the neighborhood, his account of the stranger and his disappearance was entirely satisfactory; but when the mutilated remains were discovered and recognized as those of his unknown companion, suspicion was at once excited, and he was arrested on the charge of murder. An examination of the buggy, the morning after its return to the stable, had shown the dash-board broken, and that the bottom of it had been washed out; but a more careful scrutiny of it was made, in the light of later events, and on looking at the under side it was found that a crack had allowed a few drops of blood to soak through, which still remained — most damning evidences of guilt. A seal ring was found in the bottom of it by a hostler, the morning after the fatal ride; and this ring proved to be a most valuable clue.

The moment the arrest of Udderzook and the description of his unknown victim were published, the insurance companies surmised that the mystery of Goss's disappearance might be near its solution at last, and several agents who had known him personally hastened to the scene. A glance at the remains, altered as they were, was sufficient, and acquaintances and photographs brought from Baltimore established beyond question the identity of the murdered

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companion of Udderzook with the experimenter on the York Road. The members of the family were too deeply committed to the other side to dare to acknowledge the truth, but no impartial witness hesitated for a moment.

To trace back the movements of the dead man, from his murder in the wood to his flight from the fire, proved to be a much easier task than had been the endeavor to trace them forward from his sudden disappearance. On that eventful night, he actually went, as was conjectured, to Philadelphia, where he registered himself as A. C. Wilson, a name which he retained throughout his wanderings. The next summer he spent at a farmer's in Pennsylvania, but his increasing love for liquor, fostered by his life of enforced idleness, made him an undesirable inmate in a quiet country home, and he was obliged to leave. He then went to the city of Newark, in New Jersey, where he remained in a secluded boarding-house, while the detectives were vainly searching the country for him, until after the trial in Baltimore. There were three incidents which contributed mainly to his identification, and which together were conclusive. Being, as already stated, a large man of striking presence, he had a peculiar manner of throwing his chest forward, which was very noticeable, and which he was unable to change, even when disguise of his identity became so necessary. Secondly, appears a screw-driver made with a ratchet, so that it could be used without removing the hand, a wooden model of which Goss had invented and made, and which same model Wilson possessed and was equally fond of exhibiting and explaining. Thirdly, was the seal ring already mentioned, which had belonged to

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Goss, was constantly worn by Wilson, and was found in the bottom of the buggy the morning after the murder of the stranger by Udderzook. After the identification of the murdered man with Goss, the motives for the murder were easily conjectured. The importance of avoiding detection and recognition was so great that he did not dare to engage in any employment which would necessarily bring him in contact with other people, and his own taste for an idle life probably made him perfectly willing to be supported by others. But this necessity for supporting him must have been a very heavy drain upon the conspirators in Baltimore, who were none of them persons of means, and the risk which they ran, of losing all their venture, was greatly increased by Goss's growing habit of intemperance, for a dangerous secret which depends upon the discretion of a drunken man is a powder magazine which may explode at any moment. How indiscreet he was, is shown by a conversation which he held with a fellow-boarder in Newark, a few days before his departure, in which he proposed, as a promising speculation, that he (Goss) should insure his life for \$10,000, the other paying the premium; that they should procure a small frame house, put a corpse in it, burn up the house and corpse together, prove the loss, and divide the money which the company would pay, "and even if the company should refuse to pay, added he, "a jury would be sure to make them, for I have tried it." How many beside this poor victim of the avarice of himself and others have been led into crime by the fatal tendency of juries to mulct corporations in favor of individual plaintiffs, without regard to law or justice, will

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probably never be known, but this one example shows how great a temptation that tendency affords.

It is probable that Goss expected some immediate result when the verdict was rendered in favor of the claim against the companies, and was much disappointed when he discovered that the law would interpose still further delays, before he could clutch the coveted money. He had become very tired of his quiet, secluded life, shut off from his wife, his family, and all his friends and associations, and it is not unreasonable to suppose that he may have threatened to abandon the whole thing and return openly to Baltimore. For after all he had committed no crime. He had absented himself for his own purposes, and if his relatives had taken advantage of his absence to pretend that he was dead, and to contrive a swindle upon the insurance companies, that was their affair, not his, and he could easily make it appear that he had returned to confound their villainy as soon as he had learned of it. Their testimony in the trial had concluded them, and he was now in a position to command and threaten, when before he could only beg. They appreciated the change of circumstances quite as well as he, and determined to send him abroad, where he would be less likely to be recognized, and where his indiscreet utterances would not be so dangerous. With this object in view, they raised about fifteen hundred dollars, with which amount Udderzook went to Newark toward the end of June. His influence over his weaker brother-in-law was unbounded; so marked, indeed, that even the careless observers in the little inn at Jennerville observed and commented on it, and he deliberately deter-

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mined to use that influence to lead him to his destruction. He looked over all the case calmly; he saw, as he told Rhodes, that the man was already dead to the world, and would be missed by none but those whose own safety would not allow them to call attention to his disappearance, and with his actual death all danger of discovery would be forever removed, and the money which they had raised with so much difficulty saved. Instead, therefore, of shipping Goss to Europe, he took him with him to Jennerville, and it is indicative of the calculating shrewdness of the man, that he went to his own old home, where, as he knew, his arrival with a stranger, and the subsequent disappearance of the latter, would excite no comment which would not be fully satisfied by any explanation he might choose to give. Using, therefore, for the basest purpose, the child-like confidence which Goss reposed in him, he took him to the home of his childhood, and having surveyed the ground and perfected his plans invited him out for his final drive.

From all the circumstances it is probable that Udderzook threw his arm carelessly around Goss as they were riding slowly through Baer's Woods, and then suddenly tightening the grasp, so as to hold his victim's arms, plunged a knife into his throat. Goss thrust out his feet in the death agony with such force as to break the dash-board, but another blow followed instantly, and he had no time to resist before he lay helpless in his murderer's arms. The latter must then have dragged the body a short distance into the woods, washed out the buggy, driven it back to its owner, and then returned to his horrible task of dismembering and interring the

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evidence of his crime. A bright light was seen in the woods that night, doubtless caused by the fire which Udderzook built to burn the clothing of the murdered man, as some fragments of charred cloth and burned buttons were afterwards found there. On his visit to Rhodes the day before, when he had endeavored to persuade the latter to assist him in the project which he had in mind, he was observed to notice a spade standing neglected against a barn, which spade was missing the morning after the murder; he doubtless obtained it that night, intending to use it to bury the body, but failed to observe that the handle was broken half through, so that it must have flown in two at the first stroke he made with it. This defeated his purpose of digging a deep hole for the burial, but it was too late to make other arrangements then. The night was already far gone, the early summer sun would soon be up, and he must complete his terrible task before daybreak in the best fashion he might. He was compelled by the want of proper tools to haek the body into fragments and bury them separately in such shallow receptacles as he could serape with the blade of the spade. The sun must have been up before he had finished his work, and he must have felt himself that it was unsatisfactorily done. But it could not be done again, and he therefore retreated to his mother's house, where he had some of his clothing washed, and thence to Baltimore to await the result.

The whole affair was ably planned, and would have been, from his point of view, a complete success, had it not been for his mistake in stealing a broken spade instead of a whole one. We doubt nowadays whether we should rightly call

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such a mistake an accident or a providential interposition, but in all human probability, had Udderzook been able to bury his victim so deep that the vultures could not reach him, the murder would never have been known, and the companies compelled to pay a fraudulent claim. But the shallow grave attracted the carrion birds, and their presence over it brought Udderzook to the scaffold, and saved the insurance companies from an infamous fraud.

I have mentioned only a few frauds which have been detected. How many have escaped detection is known only to Omniscience. But when we observe what comparatively trivial accidents have led to discovery, it is only reasonable to infer that there may have been many others in which no such accident has occurred. We can only be certain that the thing which has been will be again, and that only the most watchful care and unceasing vigilance will enable the officers of insurance companies to protect the interests of the honest and deserving policy-holders from the rascality of designing knaves.

PART II

SOME years ago, or, to be accurate, in March, 1876, I had the honor to read a paper on this topic before the Medico-Legal Society. At that time I considered the subject of frauds upon life insurance companies by means of pretended deaths and detailed several cases of that character. I propose now, with your permission, to relate some instances of mysterious disappearances, and to examine the rules of law governing such occurrences.

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The number of disappearances which can strictly be called mysterious is small. In most of the adjudicated cases, as will be observed, the missing person was last seen or known of in circumstances which would afford a plausible explanation of his fate, but it sometimes happens that a man vanishes from the face of the earth, or at least from all his known associations and surroundings, without affording solid ground for any conjecture, or placing any limitation upon the imagination. Two cases have recently occurred in this city which give especial interest to this subject at this time. In one, the missing gentleman left the house of a relative in the upper part of the city, about half-past ten o'clock at night, to go to his own home, a few blocks distant. His failure to arrive there excited inquiry and alarm, and within an hour of the time when last seen, the police were put upon the search. In the other, a gentleman left his office with the expressed intention of taking the afternoon train to Boston on a short business trip, and was met by a friend on his way to the Elevated Road. Both of these gentlemen were married men of mature years, happy in their domestic relations, strongly attached to their wives and children, prosperous in their worldly circumstances, free from any special cause for worry and anxiety, and never suspected of any taint of insanity. Each had but little money in his possession at the time of his disappearance, and each left untouched ample funds entirely under his own control. In both cases friends and family are unable to state or conceive any cause for voluntary absence, and every device to trace them which ardent affection aided by ample means and professional advice can

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suggest has been employed, and employed in vain. The police departments of various cities aided by private detectives, and the utmost possible publicity, have been engaged in the search, every trace or clue which could be discovered has been followed up, utterly without result. Their disappearance is to-day as complete and apparently impenetrable a mystery as when they first vanished from the sight of their friends.

Permit me to relate two anecdotes illustrating different phases of such disappearances.

Dr. King, of London, in his book of "Anecdotes of His Own Time," published in 1819, tells the following story, which I cite in his own language:

"About the year 1706, I knew one Mr. Howe, a sensible well natured man, possessed of an estate of £700 or £800 per annum. He married a young lady of good family in the west of England, her maiden name was Mallet; she was agreeable in her person and manners and proved a very good wife. Seven or eight years after they had been married, he rose one morning early, and told his wife he was obliged to go to the Tower to transact some particular business; the same day, at noon, his wife received a note from him, in which he informed her he was under a necessity of going to Holland, and should probably be about three weeks or a month. He was absent from her seventeen years, during which time she neither heard from him nor of him. The evening before he returned, whilst she was at supper and with some of her friends and relations, particularly one Dr. Rose, a physician who had married her sister, a billet without any name subscribed was delivered to her in which the writer requested the favor of

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her to give him a meeting the next evening in the Birdcage Walk, in St. James Park; when she had read her billet she tossed it to Dr. Rose, and, laughing, 'You see, brother,' said she, 'old as I am, I have got a gallant'; Rose, who perused the note with more attention, declared it to be Mr. Howe's handwriting; this surprised all the company, and so much affected Mrs. Howe that she fainted away; however, she soon recovered, when it was agreed that Dr. Rose and his wife, with the other gentlemen and ladies who were there at supper, should attend Mrs. Howe the next evening to the Birdcage Walk. They had not been there more than five or six minutes when Mr. Howe came to them, and after saluting his friends, and embracing his wife, walked home with her, and they lived together in great harmony from that time to the day of his death.

"But the most curious part of my tale remains to be related. When Howe left his wife they lived in a house in Jermyn Street, near St. James' Church; he went no farther than to a little street in Westminster, where he took a room for which he paid five or six shillings a week, and changing his name and disguising himself by wearing a black wig (for he was a fair man) he remained in this habitation during the whole time of his absence. He had had two children by his wife when he departed from her, but they both died young, in a few years after. However, during their lives, the second or third year after their father disappeared, Mrs. Howe was obliged to apply for an act of Parliament to procure a proper settlement of her husband's estate and a provision for herself out of it during his absence, as it was uncertain whether he

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was alive or dead; this act he suffered to be solicited and passed, and enjoyed the pleasure of reading the progress of it, in the votes, in a little coffee house near his lodging, which he frequented. Upon his quitting his house and family in the manner I have mentioned, Mrs. Howe at first imagined, as she could not conceive any other cause for such an abrupt elopement, that he had contracted a large debt unknown to her, and by that means involved himself in difficulties which he could not easily surmount; and for some days she lived in continual apprehensions of demands from creditors, of seizures, executions, etc. But nothing of this kind happened.

“Mrs. Howe, after the death of her children, thought proper to lessen her family of servants and the expenses of her house-keeping; and therefore removed from her house in Jermyn Street to a little house in Brewer Street, near Golden Square. Just over against her lived one Salt, a corn-chandler. About ten years after Howe’s abdication, he contrived to make an acquaintance with Salt, and was at length in such a degree of intimacy that he usually dined with Salt once or twice a week. From the room in which they ate it was not difficult to look into Mrs. Howe’s dining-room, where she generally sat and received company; and Salt, who believed Howe to be a bachelor, frequently recommended his own wife to him as a suitable match. During the last seven years of this gentleman’s absence, he went every Sunday to St. James Church, and used to sit in Mr. Salt’s seat, where he had a view of his wife, but could not easily be seen by her. After he returned home he never would confess, even to his most intimate friends, what was the real cause of such singular

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conduct; apparently there was none, but whatever it was, he was certainly ashamed to own it. Dr. Rose has often said to me that he believed his brother Howe would never have returned to his wife if the money which he took with him, which was supposed to have been £1,000 or £2,000, had not been all spent; and he must have been a good economist and frugal in his manner of living, otherwise his money would scarce have held out; for I imagine he had his whole fortune by him, I mean what he carried away with him, in money or bank bills, and daily took out of his bag, like the Spaniard in 'Gil Blas,' what was sufficient for his expenses."

Dr. King received this remarkable story from Dr. Rose and Mr. Salt, whom he often met at King's Coffee House, near Golden Square.

Singular and eccentric as this conduct was, a not dissimilar case was lately brought to light in the neighboring State of New Jersey, where in a partition suit it was shown that one of the heirs at law had left his family there, and was supposed to be dead, having been neither seen nor heard from for twenty-two years, until one of his sons discovered him in California.

(Hoyt *vs.* Tuers, 35 N. J., Equity R., p. 360.)

The other incident to which I alluded occurred in this city some years ago, and was related to me by a friend who happened to be called as a juror in the Court of General Sessions in this city, on a trial for manslaughter. The facts developed by the evidence showed that the prisoner was standing at the door of his shop, in one of the streets leading to a ferry, when he saw an intoxicated man coming towards him pursued by

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a crowd of shouting and laughing children. As he came opposite the shop, in a sudden access of drunken fury he caught up a large stone and was about to hurl it among his pursuers, when the prisoner ran out and interfered to protect them. A quarrel ensued, blows were exchanged, and the drunken man, in falling, struck his head heavily on the pavement and fractured his skull, with the result of immediate unconsciousness soon followed by death. The prisoner was acquitted, but the noticeable fact in the trial was, that the deceased never recovered consciousness so as to give his name, and there were no marks on his clothing or papers on his person by which he could be identified. Although well dressed, well appearing, and to all seeming a person of some importance, the police were never able to obtain any clue to his identity, and he was buried as unknown; somewhere in the world a family has mourned the loss of a son, perhaps a husband and father, and another name has been added to the long list of those who have mysteriously disappeared.

The cases related are in my opinion of sufficient interest to justify an examination of the law relating to presumptions of death. Best on "Presumptions of Law and Fact" states the rule to be that "the death of any person once shown to have been alive is a question of fact to be determined by a jury; and when the body is not forthcoming, as the legal presumption is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it." When a person goes abroad and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period at which he was last

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heard of. The same rule holds generally with respect to a person who has gone away from his usual place of resort, and of whom no account can be given, but the presumption does not extend to the time of his death, *i.e.*, whether he died at the beginning or at the end of any particular period of the seven years. In the case of *Watson vs. England*, which came before the Court of Chancery some years since, it was attempted to enforce as a presumption, that a female who had left her father's house in 1810, and had not been heard of for thirty-four years, was dead. No decision was come to, the Vice-Chancellor observing, from the great uncertainty of the evidence, that if he presumed her death the woman might walk into court and disprove all. In one case, according to Best, the Court of Queen's Bench said that they could not assume judicially that a person alive in the year 1034 was not alive in 1827 (*Taylor's Medical Jurisprudence*, Vol. I, p. 165). So Mr. Phillips, in his work on evidence, states that "the presumption of continuance of human life ends, in general, at the expiration of seven years from the time when the person was last known to be living; but the death of a party may be presumed in a shorter time, under the peculiar circumstances of the case." (*Phillips on Evidence*, Vol. III, p. 598.) Mr. Greenleaf states the rule and the reason for it as follows: "Other presumptions are founded on the experienced continuance or permanency of longer or shorter duration in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until

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the contrary is shown or until a different presumption is raised, from the nature of the subject in question. Thus, where the issue is upon the life or death of a person once shown to have been living, the burden of proof lies upon the party who asserts the death. But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases and the burden of proof is devolved on the other party." (Greeleaf on Ev., Part 1, Chap. IV, Sect. 41.) In like manner Mr. Starkie: "So, where the existence of a particular individual has once been shown it will, within certain limits, be presumed that he still lives. The presumption as to a man's life, after a number of years, must depend upon many circumstances: his habits of life, his age, and constitution. The probable duration of life of a person, as calculated upon an average, may, of course, be easily ascertained in every particular case; but for the sake of practical convenience the law lays down a rule in some instances, which appears to have been very generally adopted, that after a person has gone abroad, and has not been heard of for seven years, it is to be presumed that he is dead." (Starkie on Evidence, p. 76.) So Mr. Wharton: "By the Canon law, no length of absence gives a presumption of law of death; the presumption is one of fact, depending on the concrete case. By the English Common Law, at the close of a continuous absence abroad of seven years, during which time nothing is heard of the absent person by those who would naturally have heard of him, if alive, death is presumed, as a presumption of law rebuttable by proof or counter presumptions. This view is accepted in most jurisdictions in the United States. But if

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there is no proof of unexplained absence, the mere lapse of time, even supposing it would make the party eighty years old, if living, is not by itself enough to prove death. It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable, though even when one hundred years is reached the conclusion is not absolute. With other circumstances (*e.g.*, non-claimer of rights or exposure to peculiar sickness or other calamity, or advanced years), death at a far earlier period may be inferred. . . .

“It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence for seven years, certain facts have been noticed by the Courts as affording grounds on which inferences of death, more or less strong, may rest. Among these facts may be noticed: presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck, exposure to peculiar perils to which death will be imputed if the party has not been subsequently heard from; ignorance as to such person, after due inquiry, of all persons likely to know of him, if he were alive, cessation in writing of letters, and of communications with relatives, in which case the presumption rises and falls with the domestic attachments of the party. Thus death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears. It is scarcely necessary to say that evidence tending to rebut such presumption (*e.g.*, proof that the alleged

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deceased had been heard from by letter or was personally warned in a litigated suit) is always relevant for what it is worth.

“It must be also kept in mind that, in any view, death is a matter of inference, not of demonstration, depending upon an identification of remains as to which there is always a possibility of mistake.” (Wharton on Evidence, Sects. 1274 and 1277.)

Having collated these authorities from the text-books, it is in order to see how far they are sustained by the reported cases.

This subject is elaborately treated by the late Surrogate Bradford, in *Eagle's* case reported in 3 *Abbott's Practice Reports*, page 218. The question was presented on the probate of a will, one of the legatees named in which, William Eagle, had been absent between five and six years, and it became necessary to determine whether he died before or after his father, the testator. The facts presented showed that he had been a sailor from the age of sixteen years. He first made a whaling voyage to the Pacific and, although absent from home for four years, does not seem to have been heard from during that period. His subsequent voyages were principally to the coast of South America, and the last intelligence received from him was by a letter written at Baltimore something more than five years previous to his father's death, addressed to his brother-in-law. In this communication he stated that he had just arrived at that place from Montevideo as mate of a vessel, and said, “Since I have arrived I have been offered charge of an hermaphrodite brig to go to the coast of Africa, and I am balancing in

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my own mind between a captaincy and an old vessel and the coast fever. I shall determine in a few days.”

He was never heard of or from again.

By the Roman Law, captivity was equivalent to civil death, and if the husband were taken prisoner the wife might marry again; but no time was prescribed during which she should await his return, until the terms of four and ten years were successively required by Constantine and Justinian (Novel 22, Ch. 14). By Novel 117 (Ch. 11) it was ultimately provided that there should be proof of the death before the wife could marry again. Absence, however long, without certain news did not authorize a second marriage, and with this determination the Common Law agreed. In respect to property one hundred years was stated as the limit of the presumption of life in the case of absent persons *quia is finis vitæ longævi hominis est*. (Dig. Lib. 7, Tit. 1, Sect. 56. Cod. Lib. 1, Tit. 2, Sect. 23.) In conformity with this rule, in the greater number of countries on the continent which adopted their jurisprudence from the civil law, the doctrine prevailed that an absent person should be presumed to be living for a hundred years from the time of his birth, that being the longest limit of ordinary life. Sunihame mentions several conflicting views, some of the civilians claiming seventy, and others a hundred years, as the proper time. (Sunih., Pt. 6, Sect. 13, pl. 2.) A term so long and unreasonable eventually became shortened by custom and statute, and the several periods of three, five, seven, nine, and ten years were adopted in various countries. (Merlin, Absent, Act 115, Code Civil.)

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The Common Law is in accordance with the Civil Law in the adoption of the principle that the continuation of life is presumed until the contrary be shown. The statutes relative to bigamy and leases of life (1 Jac. 1, Ch. 11, Sect. 2; 19 Car. 2, Ch. 6) made an inroad upon this doctrine and established a rule, which was ultimately adopted by way of analogy in cases beyond the province of the statutes. Accordingly, when a party has been absent seven years since any intelligence of him, he is, in contemplation of law, presumed to be dead. This length of time may be abridged, and the presumption be applied earlier, by proof of special circumstances tending to show the death within a certain period—for example, that at the last accounts the person was dangerously ill, or in a weak state of health—was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long elapsed. In such cases it is to be determined as a question of fact depending on evidence when death probably occurred, and if the circumstances known are sufficient to authorize such a conclusion, the decease may be placed at a time short of the seven years, as the proof may indicate. But when there are no facts material to the solution of the question, except simply absence without being heard of, then at the end of seven years the law presumes death.

The learned judge then discusses the question of when the death occurred, whether at the beginning or end of the seven years, or at what other time, and examines the English cases on this point. In *Rex. vs. The Inhabitants of Harbourn*

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(2 Ad. and E., 540) and *Nepau vs. Knight* (5 B. and Ad., 93, 2 Mee. and W., 894), the Courts of King's Bench and of Exchequer adopted the doctrine that when the seven years have passed, the law simply presumes death, and there is no presumption as to the time of death. Lord Denman, in delivering the opinion of the Court, held this language: "It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown; but when the seven years have passed the presumption of law relates to the fact of death, and the time of death, wherever it is material, must be a subject of distinct proof. Whoever finds it important to establish death, at any particular period, must do so by evidence of some sort."

After examining the American cases, Judge Bradford proceeds: "There can be no doubt that under certain circumstances this is to be treated as a question of fact, and the language of Lord Denman is in that view strictly pertinent when he says, 'Nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact without reference to accompanying circumstances — such, for instance, as the age or health of the party. There can be no such strict presumption of law.' What, however, is a Court or Jury to do, when there are no accompanying circumstances — when there is no ground in fact for inferring death at any particular time? The question is not whether those presumptions are rigid and strict, but whether there are any such presumptions, and if so, what is their effect when there is an entire dearth of evidence tending to guide the conclusion as to life or death. Confessedly, before the analogy

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drawn from the statutes of bigamy and life tenancies prevailed, it was a rule of evidence to presume life, unless the contrary was shown. That rule still continues, except so far as it has been modified by the presumption drawn from the statutes, of death, after seven years' absence without intelligence. The practical effect of these two rules, if both are to be taken as subsisting, is that whenever the law is invoked as to rights depending upon the life or death of the absent party he is to be deemed as living until the seven years have expired, and after that is to be deemed as dead. Not that the law finds as matter of fact that he died on the last day of the seven years, but that rights depending on his life or death are to be administered as if he had died on that day. It is impossible to say when he died, or even to assert as a matter of fact that he is dead; but in the absence of all evidence the law will account him as dead at a certain time and not before. This is an artificial rule, and of course cannot be expected to square with the actual fact. It is the logical result of the presumptions, founded upon reasons of convenience, and the necessity of fixing upon some limit within which the relations of the living to the absent are to be determined, more than upon any strong probabilities. This is the meaning of our statute in respect to life estates, which declares that if the life-tenant shall absent himself for seven years, and his death shall come in question, 'such person shall be *accounted* naturally dead,' in any action concerning the lands in which he had the estate for life, unless sufficient proof be made that he is still living. (1 Rev. Stats. 749, Sect. 6; See Bigamy, 2 Rev. Stats. 687; Sect. 9.) 'He shall be

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accounted dead.' The statute so treats, just as the Common Law treated and accounted, him living until his death was proved. In neither case can it be said that his life or death has been actually proved; but in both cases it may be said that he shall be accounted living until by reason of his absence the law accounts him dead; and for the purposes of justice, the rights and relations of parties affected by his life or decease shall, in the absence of information, be determined by this technical presumption.

"This certainly seems to me the most consistent and symmetrical rule; and when it is regarded as a dry legal doctrine adopted for purposes of convenience, and from the necessity of having some limited period for the determination of the rights of absent persons, and not as a determination upon the death or the real time of the death, there would appear to be no grave objection against it. I am inclined to hold, therefore, that in the case of absent persons it is within the province of the Court or Jury to infer from circumstances, if any appear in proof, the probable time of death, but that if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted, in all legal proceedings, as having lived during that period."

The present statutory provision in this State is as follows:

"A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the State or elsewhere, for seven years together, is presumed to be dead, in an action or special proceeding concerning the property in which his death comes in question,

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unless it is affirmatively proved that he was alive within that time." (Code of *Remedial Justice*, Sect. 841.) This somewhat vague language is defined by Chancellor Walworth in the case of *McCartee vs. Camel*, 1 Barbour Ch. R. 456, where he said, "When the person whose death is to be presumed is in fact within the United States and not technically beyond sea, 'absenting himself in this State or elsewhere' must mean absenting himself from his last place of residence, in this State or in the United States, which was known to his family or his relatives who would be likely to know whether he was living; and from whom a party in the search of the truth would be likely to make inquiries. The mere fact, therefore, that the party has absented himself from the place of his birth, or from his original domicile, for more than seven years, does not raise a presumption that he is dead."

Mr. Charles Marshall, in his work on Insurance, lays down the rule that "When it is uncertain whether the death happened within the time limited, this is a question of fact which must be left to the decision of a Jury," and cites as authority the case of *Patterson vs. Black*, at Nisi Prius, Hilary Vacation, 1780, where an insurance was made on the life of L. Maclean, from the 30th of January, 1772, to the 30th of January, 1778. In an action on the policy it appeared that about the 28th of November, 1777, he sailed from the Cape of Good Hope in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, whether Maclean died before the 30th of January, 1778. To establish the affirmative of that question, the plaintiff called witnesses to

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prove the ship's departure from the Cape with Maclean; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were, on the 13th or 14th of January, the period of a most violent storm, in which she probably was lost, and that the *Swallow* was much smaller than their vessels, which with difficulty weathered the storm. Lord Mansfield left it to the jury to say whether, under all the circumstances, they thought the evidence sufficient to convince them that Maclean died before the time limited in the policy; adding that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. They found for the plaintiff. (Marshall on Insurance, p. 781.)

It is impossible to say in this case that the verdict of the Jury was not justified, as the facts presented were such as to create a reasonable probability that the vessel in which the insured had embarked was lost with all on board, and the life insurance companies are frequently called upon to make payments in similar cases. The only requirements that can justly be made are conclusive evidence that the insured set sail on the missing vessel, and a strong presumption that she was lost at sea. A somewhat similar case arose not long since in regard to a gentleman who left Boston for New York by the Fall River boat. He was proved to have been on board of the boat during the evening, to have taken supper on her, and all traces of him were lost from that moment. He was a man over 50 years of age, quite near-sighted, subject to attacks of vertigo, and was supposed to have fallen overboard; but although large rewards were offered for the recovery of

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the body, hand-bills freely distributed along both shores of the Long Island Sound, an extensive detective force employed and stimulated by the prospect of great pecuniary gain, no result was obtained. Here it is easily conceivable that the missing man might have been engulfed in the waters of the Sound, and his body buried in its depths, or swept out to sea.

A similar case to this is that of *Boyd vs. New England Mutual Life Insurance Co.*, decided by the Supreme Court of Louisiana in May, 1882, in which the facts were, that Clotworthy Boyd, the subject of the insurance, left Brashear City in July, 1875, on a voyage by sea to Galveston. In company with one Dowling he occupied a stateroom opening on the guards, abaft the wheel-house, near which was a space where the edge of the vessel was protected by nothing but a swinging chain. Boyd, during the day, was very seasick, and he and Dowling sat on the guards opposite the space, and Boyd frequently went to the edge and vomited over the chain. Late at night, Boyd continuing to suffer, they went to their stateroom, and Dowling undressed and went to bed; but Boyd soon after, complaining of sickness and the close air, asked Dowling to get up and take him out. Dowling excusing himself, he went out alone, and has never since been seen or heard of. Dowling, on awaking in the morning, found his berth vacant. Not specially alarmed at first, he inquired of the steward, who told him he had not seen him; then, after waiting a while, made a search for him with the steward, without finding him. The steamer arrived in Galveston about 10 A.M., and Dowling watched the passengers go ashore

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to see if Boyd would come out. He then went to the residence of Boyd's brother in Galveston, and informed him of the circumstances. Boyd has never since been heard of. His valise, which was his only baggage, remained on the vessel, and his hat was also found on board, though the evidence as to where it was found is not satisfactory. Nearly seven years had elapsed since the date of the disappearance, and the Court was not advised that any tidings had yet been heard of him.

Fenner, *J.*, in delivering the opinion of the Court, said: "If the proof of death stood upon a bare presumption following exclusively from the mere disappearance of Boyd, we agree with the counsel for defendant, that the duration of his absence without being heard of would not be sufficient to support a presumption equivalent to proof of death, under the Articles of our Code, touching absentees. (C. C. Arts, 57, 75.) But death, like all other facts, may be established by circumstantial evidence when, from the nature of the case, direct evidence is not accessible. Absence, without being heard of, though not of sufficient duration to create a legal presumption of death, may yet be one of other attendant and supporting circumstances, which, taken together, would satisfy the mind and conscience of the Judge or jury that the party was dead. This is all that is required. Thus, disappearance under circumstances of shipwreck, or earthquake, or battle, or explosion, or like perils, might well produce such conviction. And this Court has held that in such matters it is essentially within the province of the Judge to draw the line of distinction by the exercise of a

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sound discretion, founded on the facts of each particular case.”

Succession of Vogal, 16 An., 139;

Succession of Jones, 12 Ib., 397;

The Reporter, Vol. xv., p. 147.

But there are cases, not infrequent, where no such solution is possible, and the cause of the absence is totally unexplained. One such is that of *Hancock, Admr., vs. The American Life Insurance Co.*, in the Supreme Court of Missouri, reported in 5th Bigelow Life and Accident Reports, 248. The facts shown were that the supposed decedent, Henry C. Morris, was a single man; that for many years previous to his alleged death he had been in the habit of spending his time in the South, engaged in mining speculation; that he left the South and was for some time visiting his friends and relations in Quincy, Illinois, and from there went East, and during the winter of 1860 and 1861 he boarded with a Dr. Scott, in New York City. At Albany he became interested in a patent stove, which he designed introducing in the South, and had a pattern made and shipped there for him. The Rebellion at that time was about to commence, and he was open and outspoken in his sympathy with the Southern people, and declared his purpose to go South and take up arms in their defense. His health seems to have not been very good, though the witnesses think that he was able to attend to business. About the 1st of March, 1861, he left his room at Dr. Scott's, with the intention of going to Brooklyn, and did not return. His clothes and valise were left in his room, but they were of little value. His friends and relatives testified that they never

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saw or heard of him any more. Dr. Scott testifies that he received a letter from him in the September following, but there was testimony going to show that he was mistaken, and it is evident that the jury must have thought so. It appears also that Morris was indebted to Dr. Scott, and also to a lady, for borrowed money; that previously he was in the habit of writing to his friends and relatives, but after his disappearance, about the 1st of March, they never received any letters from him.

Upon these facts the question was submitted to the jury whether Morris died before June 6, 1861, at which date the policy lapsed of non-payment for premium, and they found that he did. In reviewing the case in the Appellate Court, Chief Justice Wagner says: "It may well be conceded that where a person who is studious in his habits, attentive to his business, has a fixed and permanent residence, and is surrounded by those influences which are calculated to endear him to his home, suddenly and unaccountably disappears, a presumption may arise which would warrant a jury in finding that he is dead. But will the circumstances of this case warrant the admission of any such doctrine? Morris had no family, he had no fixed or permanent place of abode. For years he had been residing in the South, being in different States, and engaged in different places. He told his relatives that he was going back to the South. He made arrangements to introduce a patent there. He was warm in his sympathies for the Southern cause, and expressed his determination to take up arms in its defense. No intention was ever shown of staying in New York or with his friends in the North.

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According to his declared design he was going South, as thousands of others did in those times.

“The case therefore simply presents a sudden and unexplained absence on the part of Morris, without being accompanied with any surrounding perils, and with his often repeated declaration that he intended to go to another part of the country where his interests and sympathies were centered. The law will now presume that he is dead, but there is no presumption that he died previous to the expiration of seven years from his disappearance, and there was no evidence of death prior to the 8th of June, 1861, to entitle the case to be submitted to the jury.”

The judgment was therefore reversed. The case conceded in *Hancock vs. American Life Insurance Co.* (*supra*), when a person, “studious in his habits, attentive to his business, having a fixed and permanent residence, and surrounded by those influences which are calculated to endear him to his home, suddenly and unaccountably disappears,” arose in Iowa, and was referred to in the opinion quoted. In this case (*Tisdale vs. Connecticut Mutual Life Ins. Co.*, 26 Iowa R., 170), the insured was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends, and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition, which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, Sept. 25, 1866, upon business, he was last seen by an

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acquaintance on the corner of Lake and Clark streets, in that city, about 3 P.M., of that day; no trace of him was afterwards discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for any information that would lead to his discovery, either dead or in life. The detective police were employed to search for him without results. No tidings were ever received of him, and not the faintest trace of the cause or manner of his disappearance was ever discovered.

He gave no intimation to any one of an intention to absent himself, and the latest declaration of his intentions was to the effect that he expected to leave Chicago on the day of his disappearance to join his wife, at Dubuque. He owed no debts amounting to any considerable sum, and had made payments of small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travelers, was found at his hotel, and his bill was unpaid. In the Circuit Court, the jury was instructed that to raise a presumption of death within a time less than seven years it must be shown that the person alleged to be dead was subject to some special peril, which might reasonably be supposed to have produced his death.

In the Supreme Court this instruction was declared to be wrong, and it was held that evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from

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which the death of one absent and unheard from may be inferred, without regard to the duration of such absence.

This decision carries the doctrine of presumption to an extreme and, to my mind, a very dangerous length. It in effect reverses the old doctrine of a presumption of life, and presumes that a man who leaves his home and friends is dead, unless some good reason can be discovered for his departure. It ignores the limitations stated by Judge Bradford, in *Eagle's* case (*supra*) of "special circumstances tending to show the death within a certain period — for example, that at the last accounts, the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident, or that he had embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long elapsed." It assumes simply that because a motive cannot be discovered, none existed, and that mere absence, without satisfactory explanation, raises a presumption of death. In a case arising on another policy upon the same life (*Tisdale vs. Mutual Benefit Life Ins. Co.*) in the Circuit Court of the United States in Iowa, reported in 4th Bigelow's Life and Accident Ins. Reports, page 58, Mr. Justice Lowell, in charging the jury, said, "Supposing you should adopt the defendant's theory of the case, looking at it from this standpoint, to wit, that Tisdale was not dead at the time letters of administration were issued, but that he had absconded; in the absence of any motive on his part to abscond, it will not be presumed that he did abscond; but if from the evidence the jury find the fact to be that he did abscond, then the want of motive would have nothing to do with the case. If

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the jury find that he did abscond, then it would follow that some motive existed. The absence of motive to abscond is a material fact, to be considered in a doubtful case. If the principal fact be proved, that is, if this party was seen at Baxter Springs sometime subsequently to the appointment of an administrator, and this fact is shown as proof of his having absconded, then the fact of a want of motive to abscond is unimportant, because we cannot always look into the human heart and discover its motives. Crimes are frequently committed of a very grave nature, and yet we can discover no motive. In general, motives must be inferred from facts, rather than facts inferred from motives. If it is established by proof that an act has been done, we know there has been some motive for it, though we cannot see what that motive was."

This reasoning appears to me to be sound, and to dispose of the difficulty which induced the Supreme Court to assume that the insured must be dead because they could find no motive for his leaving his home, family, and friends. The Judge well intimated that no human being can read the mind or appreciate all the motives which govern the actions of another; and the fact that we cannot discover the reasons which led a man to commit a certain act, does not at all prove that he did not have reasons satisfactory to his own mind, and justifying, to him, his course of action. I am incapable of appreciating that the presumption that a man could be done to death or commit suicide in a crowded city without leaving a trace behind him is any less violent than that he should have had reasons for hiding himself from all

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who knew him, with which his family and friends were not acquainted. For there are only a few conceivable explanations of so-called mysterious disappearance. If alive, the missing person must have deliberately absconded, been abducted, or confined in some hospital or asylum as the result of sudden bodily or mental disease or accident; if dead, he must either have been murdered, killed by accident, or committed suicide, under circumstances which either left no trace of him whatever, or precluded the possibility of identification. That one of the latter group of contingencies is possible, cannot be denied; but that, in the absence of any proof whatever, one of them should be presumed rather than one of the former group seems to be unwarranted by what we know of natural laws. On the contrary, considering the presumption of life, I think we are bound to assume some contingency consistent with that presumption, rather than the contrary.

There is no wild improbability in assuming that a person situated as was the insured in the case last cited may abscond from home and conceal himself elsewhere, for reasons unknown to others but satisfactory to himself. And this is the only case I have found in which it was held that mere absence in itself, and unaccompanied by any proof of circumstances importing a danger to life, was sufficient to justify a jury in finding the fact of death. The opinion is therefore supported neither by reason nor authority, and may be regarded as of slight value as a precedent.

Some years ago life policies were issued containing a provision that no presumption of death should arise from

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disappearance until the policy should have been continued in force by the payment of premiums throughout the expectation of life of the person upon whose death the contract matured according to the company's table of mortality, reckoned from the date of the policy. This is probably the fairest rule for all concerned, as it gives the company what it had the right to expect when it issued the policy, and requires the beneficiary to pay what he should have expected to pay. In the absence of any such provision the question of death is one of fact, and the rule of presumption appears to be, that if the insured was exposed to any circumstances of special peril, such circumstances conjointly with his absence will justify the jury in finding the fact of death, but without such circumstances, mere unexplained absence will not sustain such a finding before the expiration of seven years. After that period the burden of proof shifts, and it devolves upon the defendant company to prove that the insured is still in being.



THE LAW OF MORTMAIN

A PAPER READ BEFORE THE SOCIETY OF THE Φ . B. K.
ALUMNI IN NEW YORK ON MAY 15TH, 1884

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THE wisdom of mankind concedes it to be an axiom resulting from its experience, that refined architecture is at once a product and a proof of a high civilization. The ruins of Baalbec are accepted as conclusive evidence that a cultured and intellectual race once inhabited its walls, and the story of historic times shows the improvement and development of architecture *pari passu* with the civilization of the nations. From the rude huts of a few herdsmen clustered together on the banks of the Tiber to the magnificent Rome of the Emperors is an enormous stride, but the change took place slowly by perceptible gradations, and marked the gradual education and refinement of the people. As wealth accumulated, there arose a class who were not forced to unremitting labor, by the incessant needs of their existence, leisure was afforded for the study first of comfort and then of luxury, until the stately palace and the magnificent bath, with all their resources for mental and physical enjoyment, replaced the humble roof which yielded shelter for the night. In like manner the early settlers in this country had neither time nor money to devote to the refinements of life. The daily battle for existence with the opposing forces of savage nature and more savage man was so severe and exhausting

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as to require the application of all their energies to the mere struggle for life. *Sed tempora mutantur et nos mutamur cum illis.* The battle has been won, and the present generation is enjoying its fruits. With that success has come large accumulated wealth, and with it taste, refinement, and a desire to cultivate the esthetic side of our natures. The science of architecture has been widely appealed to in order to gratify this desire, and the expensive and often elegant buildings which have arisen in every direction over the country within the last twenty-five years are the result. That these are almost universally the work either of the General or State Governments, or of corporations, is a necessary result of the laws of the country which make it impossible for an individual to "found a family," in the English sense of that expression, and deprive him of a motive for extensive investments in a single building. On the Continent of Europe, the tendency of corporations, such as insurance companies and banks, which from their nature have large amounts of capital, to invest in real estate, is very marked, and the traveler whose eye is attracted by the elegant appearance of long rows of dwellings, or extensive stores, in some of the large cities, is surprised to find on inquiry that many of them are owned by corporations. The fact that this policy has been long pursued and meets the approval of the governments and people of France and Germany seems to prove that such investments work no public injury there, and leads us to ask why they should be forbidden here.

Among the peculiar prejudices which we have inherited from England, in common with the other countries colonized

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from that fertile mother, is the one which deems the possession of large quantities of land by corporations injurious to the public welfare. I presume it to be beyond question that the repeated enactment of statutes of mortmain, from the time of Magna Charta, down through the reigns of successive monarchs to the existing statute of George II, has begotten and fostered a blind, unthinking impulse which shows itself in the limitations usually inserted by American legislatures in the charters of corporations, forbidding them to hold real estate beyond such as may be necessary for the purposes of their business, although the original reasons for such restriction have long since disappeared.

For the benefit of such of my hearers as are not versed in the technical phrases of the law, I cite from Burrill's Law Dictionary the definition of the term mortmain: "A dead hand; a condition of property in which it is held without the power of change or alienation. A term originally applied to the possession of land by ecclesiastical bodies, the members of which (being professed) were reckoned *dead* persons in law. Afterwards applied to purchases and acquisitions by any corporate body. Thence the statutes prohibiting conveyances of land by deed or will to a corporation were termed statutes of mortmain, or mortmain acts."

This country is young and growing, and in all probability for years to come, as for years past, investments in real estate will prove the most safe and profitable. The family which has been able to retain the large farm, or the ancestral estate, and meet the annually recurring taxes and other necessary burdens upon its land, has a sure fortune of which no acci-

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dent can deprive it. The statistics of this county show from year to year a steady rapid appreciation of its real property, which, of course, enures to the benefit of the owners. As many corporations, whatever their main object, must, as an incident of their work, invest their accumulated funds for a longer or shorter period, and as it is for the interest of their stockholders that such investments should be made in securities that are not only safe, but appreciating in value, it seems unjust that they should be so limited in their choice of investments as to be prohibited from placing their funds in the best and safest of all securities, unless there be some strong controlling reason of public policy for the prohibition. In the present day, when every class of business is conducted by corporations, there is scarcely an individual who is not directly or indirectly interested in the prosperity of some banking, insurance, manufacturing, mining, or other association, and it is therefore well worth our while to inquire whether any such reason does in fact exist.

Let me pause for a moment to explain, if not to qualify, the statement made in regard to the steadily increasing value of real estate in this country.

It is true that this increase has been mainly in, and in the neighborhood of, cities, for while the aggregate valuation of real estate has largely augmented, average farming land in New England and the Middle States is cheaper than twenty years ago. For this there are two causes, both of which may be considered to be of a somewhat local and temporary character, one being the development of agriculture in the West, and the other, of manufactures in the East. The more

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fertile lands of the newer States drew away many of the more enterprising and especially the youthful farmers from the bleak hills of New England and the exhausted lands of Virginia to the rolling prairies of the interior, but the increasing difficulty of procuring transportation for their crops from these distant fields to a market, and the over-abundant supply of labor for factories, is already beginning to revive agriculture in the East, and will doubtless continue to have that effect. The increase of manufacturing centres in the West also affords a more abundant home market, which will demand and receive consideration and supply, as that section consumes more of its own products and has less surplus to spare. As the area of grain production rolls farther and farther westward, the cost of transportation must increase, until the growth of grain in this part of the country again becomes remunerative, and the farming land again reaches its former, if not a still higher, value.

I propose, then, to examine briefly into the origin of the statutes of mortmain, and the causes which gave them birth. We pride ourselves as a people (and very justly) upon our willingness to throw off the shackles of old habits and inherited prejudices, and be guided by the pure light of reason. The mere fact that an abuse or a wrong has existed for centuries is, with us, no argument for its continuance, if it can be demonstrated that an abuse or a wrong really exists. That the limitation of the Common Law right of corporations to hold real estate to any extent they think proper is a wrong seems to me to be susceptible of proof.

Sir William Blackstone, in his Commentaries on the Laws

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of England, gives the following reasons for the existence of corporations: "As all personal rights die with the person, and, as the necessary forms of investing a series of individuals one after another with the same identical rights, would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continue, to constitute artificial persons who may maintain a perpetual succession, and enjoy a kind of legal immortality."

These artificial persons thus resembling, or rather being substitutes for, individuals, have certain powers, rights, and capacities inherent in their very nature. It is sufficient for my purpose to state on the same high authority that among these rights, as a necessary consequence of their existence, is the power to purchase lands and hold them for the benefit of themselves and their successors.

A corporation, therefore, at common law, had the same right to purchase, hold, dispose of and trade in real estate, as an individual, and the inquiry is naturally suggested, why and how was this right restricted. To answer this, I will again have recourse to the great storehouse of Blackstone's Commentaries: "By the common law," says that writer, "any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always and is still necessary for corporations to have a license in mortmain from the crown to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of

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escheats and other feudal profits by the vesting of lands in tenants that can never be attainted or die. . . . When these donations (*i.e.*, to religious houses) began to grow numerous, it was observed that the feudal services, ordained for the defense of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like; and therefore, in order to prevent this, it was ordained by the second of King Henry III's great charters, and afterwards by that printed in our common statute books, that all such attempts should be void, and the land forfeited to the lord of the fee."

Another reason for these enactments is hinted at by the same author, in describing the gradual encroachments of the Papal power upon the independence of the Church of England. He says, that "Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavored to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretenses to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior, the Pope. And as, in those times of civil tumult, great rapines and violence were daily

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committed by overgrown lords and their adherents, they were taught to believe that founding a monastery a little while before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the Conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to or purchased by the monks and friars was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege."

Hume substantially repeats the first of these reasons in his History of England, when he says of Edward I: "He seems to have been the first Christian prince that passed a statute of mortmain; and prevented by law the clergy from making new acquisitions of lands, which by the ecclesiastical canons they were forever prohibited from alienating. The opposition between his maxims with regard to the nobility and to the ecclesiastics leads us to conjecture that it was only by chance he passed the beneficial statute of mortmain, and that his sole object was to maintain the number of knight's fees, and to prevent the superiors from being defrauded of the profits of wardships, marriage, livery, and other emoluments arising from the feudal tenures. This is indeed the reason assigned in the statute itself, and appears to have been his real object in enacting it."

These expressions of opinion will strike us with more force if we glance for a moment at the condition of Europe at the

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period to which these writers refer. The Papal power was then at the zenith of its supremacy, and was constantly extending its influence over all classes of society, and every circumstance of human life. In all ages of the world, in every country of which we have any historical record, where an organized priesthood existed, the constant struggle of the ecclesiastical power has been to claim and exercise a control in civil affairs, and over rights, both of property and person. The priesthood of the Middle Ages certainly formed no exception to this rule, and we find their influence penetrating everywhere. The ecclesiastical courts maintained exclusive jurisdiction over their own subjects, and the bishops, by granting the tonsure which conferred the privilege of the clerical order, indiscriminately, increased immensely the number of persons exempted from the civil jurisdiction. By a further stretch of power, orphans and widows, the stranger and the poor, the pilgrim and the leper, under the appellation of persons in distress, came within the peculiar cognizance and protection of the Church, as well as the whole body of crusaders, and those who had merely taken a vow to engage in a crusade.

These extensive claims and their enormous accretions of real estate (for at that time the religious houses are supposed to have owned at least one fifth of the territory of England) naturally awakened the jealousy and fears of the laity, and the murmurs of discontent heard among the latter were swelled by the chorus of the priests who had themselves begun to dread the increasing power and exactions of the Court of Rome. The Popes had assumed, through the machinery of

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a Council, to impose a general tax upon all ecclesiastical property, and the effect of such proceedings was very naturally to produce a wide-spread disaffection among the clergy. To quote the author last cited, "pillaged upon every slight pretense, without law and without redress, the clergy came to regard their once paternal monarch as an arbitrary oppressor. All the writers of the thirteenth and following centuries complain in terms of unmeasured indignation, and seem almost ready to reform the general abuses of the Church. They distinguished, however, clearly enough between the abuses which oppressed them and those which it was their interest to retain, nor had the least intention of waiving their own immunities and authority. But the laity came to more universal conclusions. A spirit of inveterate hatred grew up among them, not only towards the Papal tyranny, but the whole system of ecclesiastical independence."

When this was the prevailing tone of popular thought and opinion, we might expect action looking towards a curtailment of ecclesiastical power, and as land was the main source of wealth, and substantially the only form of investment, as well as the most conspicuous possession of the clergy, we should equally expect that the first attack would be made upon that point. The fact that land so held was exempted from the ordinary burdens of the State was at once a reason and an excuse for limiting its extent, and it naturally occurred to reflecting men that if the Church peremptorily denied the supremacy of the State over her temporal wealth, it was but a just measure of retaliation, or rather of self-defense, that

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the State should restrain her further acquisitions. (Hallam's Middle Ages.)

That the rescarches of this thoughtful and philosophical writer had thoroughly convinced him of the existence of this popular jealousy and distrust appears again in his Constitutional History of England when, in speaking of the visitations of the monasteries by Cardinal Woolsey, he says: "The enormous and, in a great measure, ill-gotten opulence of the regular clergy had long since excited jealousy in every part of Europe. Though the statutes of mortmain under Edward I and Edward III had put some obstacle to its increase, yet as these were eluded by licenses of alienation a larger proportion of landed wealth was constantly accumulating in hands which lost nothing that they had grasped."

The testimony to prove that these statutes were inspired by and directed against ecclesiastical corporations only is further strengthened by a remark made by Mr. Buckle in his History of Civilization. In discussing the proximate causes of the French Revolution he observes: "It was in 1749 that the French Government took the first decisive steps against the Church. And what proves the hitherto backward state of the country in such matters is that this consisted of an edict against mortmain, a simple contrivance for weakening the ecclesiastical power, which we in England had adopted long before."

We have already seen that this restriction in France applies to ecclesiastical corporations only, and that lay societies are unlimited in their acquisition and tenure of real estate.

These citations from writers, who will certainly be con-

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ceded to have understood their subject, give us substantially three reasons for the restriction of the right of corporations to hold lands:

1st. That by such tenure the land was relieved of its feudal burdens and the lord's revenue diminished.

2d. A jealousy of such tenure by corporations which acknowledged the supremacy of a foreign prince in political as well as religious matters.

3d. A prejudice against such tenure by corporations which made it a matter of religious duty never to alienate lands once acquired.

The mere statement of these reasons is sufficient to show how utterly foreign they are to the living issues, unless possibly some may see ground for apprehension in the last, and fear that financial corporations would feel bound, equally with the religious houses, to retain forever all real estate once acquired. That danger is probably of as little real importance as the opposite apprehension that once prevailed in France, namely, that the operation of the laws of inheritance compelling the equal division of land among all the children of a decedent would in time subdivide it into such small portions as to produce a nation of paupers. The corporations could be trusted not to depreciate their own property by any unfair and iniquitous conduct, and if by any undue acquisition on their part the demand for land by individuals should be increased, the temptation of large profit would soon produce its natural and necessary effect. No corporation could possibly invest all, or even the greater part, of its funds in real estate, because from the fluctuations of business,

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with its alternate reverses and successes, it would be compelled to hold a large proportion of its funds in securities readily convertible to meet emergencies. The law of supply and demand would exert its inevitable influence over them as over individuals, and a large demand for land on their part for investment would result in raising prices as compared with other securities, to such an extent that investment in the latter would be the more profitable course, and therefore the one to be adopted.

History shows us many instances of large real estate transactions being carried on by corporations, not only without injury, but with positive benefit to the body politic. The success of the British East India Company, and of the Illinois Central and Pacific Railroads in our own country, afford striking examples of the successful management of immense properties by corporations, and of the benefit which the entire community may derive from the aggregation of capital possessed by an association when used to develop and improve real estate. From its nature and the extent of means required to render it valuable and productive, this class of property would seem to be especially the one to which joint stock enterprise might be advantageously devoted. The language of Professor Bowen in his elaborate and able work on American Political Economy seems peculiarly adapted to this point. He says: "Many kinds of production can be successfully kept up only upon a large scale, for the larger the enterprise the further the division of labor may be carried. In order to keep such enterprises in motion, capital must be aggregated in large masses. In England, the great

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inequality of the distribution of wealth allows such enterprises to be managed by individuals; in most cases a large manufacturing establishment is owned either by one person, or by a firm which embraces but a few partners. In the United States, from the comparative paucity of large private fortunes, such an establishment is generally formed and conducted by a joint-stock company, which is comparatively a modern invention, but one that, from its democratic character, is peculiarly suited to this country and to the wants of the age. Many small capitalists by clubbing their means can successfully compete with men of vast fortune — an undertaking which would otherwise be a hopeless one, as the great capitalist can live through reverses of trade, commercial crises, and casualties which would ruin one who had little or nothing in reserve. So consonant are these joint-stock companies to the genius of our institutions and to the circumstances of the country that they have multiplied with astonishing rapidity. They have survived even the necessity which has called them forth; for as large private fortunes have sprung up with the growth of national opulence, the owners of them have preferred to distribute their capital by taking stock in many of these associations rather than to concentrate it upon one undertaking. The risk of a sweeping calamity is thus materially diminished. I know of nothing more irrational than the common prejudice against such corporations. They are true savings banks in which the common laborer not infrequently invests his modest savings and shares the gains of his wealthy employer, instead of being crushed by competition with him. It is not unusual for

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operatives to hold stock in the very manufactories in which they work for wages. At any rate, the savings banks, to which they first confide the fruits of their economy, often invest them in such stock. These corporations allow persons of very moderate means to participate in enterprises which in other countries are conducted exclusively by the rich." That among the enterprises which may be so conducted, and most successfully, are real estate operations, is shown by the numerous co-operative building associations, both in England and this country. These corporations hold land, often in large tracts, on which they erect stores and dwellings usually for sale to their own members, and have enabled many persons of moderate means to acquire and pay for a home by small instalments, which would otherwise have been hopelessly beyond their reach.

The logic which will allow one corporation to hold and deal in real estate as its primary business, and forbid another to purchase it for the investment of its surplus funds, seems defective, and can only be accounted for by that principle of selection which, according to the old proverb, allows one man to steal a horse with impunity, while it hangs another for looking over the fence.

Land in this country gives its possessor no advantage or power in a political point of view. In England, it is still a source of both political power and social influence, but here the owner of an immense landed property possesses no advantage whatever over the equally opulent owner of personal securities. Indeed, the latter may wield much greater influence from the superior availability of his resources which

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enables him to take immediate advantage of every opportunity for profitable investment. It may easily be conceived how in feudal times the great landlord with his absolute control of all his tenantry exerted immense power, and how the acquisition of land was the preliminary step to influence and wealth. Even in later times, with a restricted suffrage and uncertain tenures by lessees and tenants, the power of the land-owner remained great. But in this country, where the supply of land is practically limitless, where the systems of registration and conveyancing offer no bar to the security of tenant rights and the easy, inexpensive transfer of titles, where the poorest occupant of a tenement casts a ballot, as well as his landlord, the influence of the owner of real estate is no greater than that of any other capitalist; and whether his landlord be an individual or a corporation, the tenant is equally secure in his rights, and equally under the protection of the courts and the laws.

The multiplied forms of wealth in these latter days have had further effect in diminishing the prestige of land, because it is no longer the main depository for accumulations. Government bonds, and the stocks of countless States, municipalities, and corporations, have taken its place, and land is now merely one of numerous securities possessing no special advantages for its owner, except such as are inherent to its character as a form of investment.

Nor is it to be apprehended that corporations will suffer land to remain idle and unimproved in their hands. I of course refer only to civil or lay corporations, for ecclesiastical ones have methods of their own, which I am not considering.

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The very condition of the existence of a financial corporation is a wise and judicious improvement of its resources, to enable it to obtain the largest possible return from all its investments. Whether those be made in personal securities or in real estate, the ruling motive of the corporation, its own self-interest, will impel it to make them in the most profitable manner. If they be in the purchase of real estate, the law of its being will require it to develop and improve that estate as rapidly and as advantageously as possible, and it is safe to assume that any corporation which fails to do so will soon give place to its more energetic and enterprising rival. The keen competition of our business life, which incites corporations, no less than individuals, to incessant activity, is a sufficient guarantee against the sloth of *dead hands* in the present age.

There are three considerations which seem to make investments in real estate peculiarly advantageous to corporations, especially to such as have to invest large accumulations of assets through long series of years, and for which the great desiderata are stability, permanence, and security.

I. *Stability*. — In a growing country, and one which is full of life and energy, real estate must have a constant and advancing value. The growth of wealth, the increase of business, create a demand for dwellings in which that wealth may be enjoyed, and for stores and warehouses in which that business may be transacted. With that progress comes also a proportionate increase in the number of mechanics, artisans, merchants, and professional men, food consumers not food producers, increasing the returns of the farmer, and adding

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in the same ratio to the value of farming land. Real estate, then, prudently selected and properly managed, is sure to yield adequate returns for the investment, and to be readily saleable when circumstances compel a realization of assets. It cannot depreciate rapidly in value, nor, if the corporation owning it be managed with sound judgment, need it ever be thrown upon the market in times of depression and general shrinkage. When an undying corporation holds lands by an unlimited tenure, it may disregard the temporary fluctuations which often affect real estate in cities when the quarter which has been fashionable for residence ceases to be so, and the advancing tide of business demand has not yet reached its stagnant pools. The corporation can afford to wait for the reaction which is sure to come, while the individual often cannot. The persons sometimes encountered who have lost largely by real estate investments are those who have become, to use the common expression, *land poor*, by having heedlessly purchased so largely (and mainly of unimproved property) that their income is insufficient to meet the necessary charges, and they are forced to sell at an unfavorable moment. A financial corporation of large cash assets, available at all times, is not liable to such a contingency, and can obtain in such investments the stability which it requires.

II. *Permanence*. — One of the main items of expense incurred by a corporation in transacting a large business is caused by the necessity of frequently changing investments. Most of our large savings banks and insurance companies place their assets mainly in bonds and mortgages, and these

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are constantly shifting, requiring the employment of a large clerical force, and much expenditure of care and time, to superintend the incessant payment of old loans and placing of new ones. The difficulty is not removed by the purchase of Government or other bonds, for the periods of time for which these usually run, from five to twenty years, is but a brief space in the life of an immortal corporation, and with every change of investment, new expense and greater or less loss of interest is necessarily incurred. Much of this loss would be avoided by investments in real estate, as the expense of its management should be but a small percentage of its returns, while the property purchased could be held permanently, and the corporation relieved from the necessity of making any changes, except in unusual and exceptional cases. There are, of course, instances, especially in our large cities, where the character of a neighborhood alters to such an extent that property there may lose a portion of its value as already noted, but such changes are rare, and when they occur, so gradual and progressive in their operation that very ordinary caution would suffice to anticipate and guard against them.

III. *Safety.* — An additional consideration of great importance is the almost absolute safety of investments of this character. Figures may be manipulated and bonds may be stolen, but stockholders who know that the assets of the company in which they are interested are mainly invested in real estate can be equally indifferent to burglars without and defaulters within. Real property cannot be stolen or embezzled, and the publicity attending any mortgage or

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transfer of it would prove a sufficient bar to any attempt towards its improper conversion.

This subject has never, to my knowledge, been examined or discussed in this country, in view of our circumstances and relations, but has been regulated by blind adherence to the traditions of the old world. "We have not in this country re-enacted the statutes of mortmain," says Chancellor Kent, in his Commentaries, "or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the Acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects; and in the force to be given to the exception of corporations out of the Statute of Wills, which declares that all persons other than bodies politic and corporate may be devisees of real estate.

"The statutes of mortmain are in force in the State of Pennsylvania. It has been there held and declared, by the judges of the Supreme Court of that State, that the English statutes of mortmain have been received and considered the law of that State, so far as they are applicable to their political conditions; and that they were so far applicable that all conveyances by deed or will of lands, tenements, or hereditaments made to a body corporate, or for the use of a body corporate, were void unless sanctioned by charter or act of assembly. In the other States it is understood that the statutes of mortmain have not been re-enacted or practised upon; and the inference from the statutes creating corporations and authorizing them to hold real estate to a certain

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limited extent is that our statute corporations cannot take and hold real estate for purposes foreign to their institution. As we have no general statutes of mortmain, perhaps a legally constituted corporation in another State can purchase and hold lands *ad libitum* in New York, provided their charter gave them the competent power."

Since this was written a decision of the U. S. Supreme Court (*Paul vs. Virginia*, 8 Wallace, 168), which holds that a corporation is a creature of the State in which it was chartered, and has no rights in other States but such as may be given it by statute therein, seems to contradict the statement of the eminent jurist.

In a footnote to the paragraph quoted, the learned Chancellor adds: "This is declared to be the law in Kentucky (*Lathrop vs. Commercial Bank of Sciota*, 8 Dana, 114). The decision in that case goes to establish the doctrine that a corporation of another State or nation can contract or sue on contracts made by its agent in Kentucky, provided they be such as its charter authorizes, and consistent with the local law and policy of the State; and a corporation of another State can take and hold lands by purchase, mortgage, or devise when consistent with its charter, and not denied by positive law. This liberal and enlightened decision was fully considered and ably sustained."

From the tone of this last remark, it would seem that this distinguished lawyer himself saw no danger in allowing corporations to hold real estate, and it certainly seems harsh and unreasonable that in this State such a privilege should be denied to those domestic associations which have done so

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much to accumulate capital within this State, and added so largely to its wealth and prosperity.

The experience of the city of New York, during the past few years (and I have no doubt it could be paralleled elsewhere) shows the unfortunate results of the present restrictive systems. While the large corporations had millions of dollars lying idle in banks, for which they could find no safe investment, the owners of real estate were confronted with a dead market, and were in many cases driven to forced sales under the hammer, with their attendant loss. Had these corporations been allowed to purchase, they could have done so with large profit to themselves, and at the same time, by relieving small holders and putting their funds into circulation, have done much to relieve the general stagnation.

It must be remembered that while the statutes we have been considering have existed for more than six hundred years, the joint stock corporations to which they are made to apply were hardly in being before the last century, and have only quite recently attained full growth. It is an anachronism to fetter these children of modern enterprise and energy in the swaddling clothes which suited the decrepit dwarfs of the Middle Ages, and to hamper the action of co-operative undertakings with the shackles designed to prevent the selfish aggrandizement of a decayed church. Whether it may ever become desirable to limit the accretion of corporate wealth, or to set a bound to the extent of corporate transactions, or not, there can certainly be no good reason for restricting the mode of the investment of that wealth, or for drawing an

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arbitrary distinction, as regards corporations, between real and personal property.

I have treated the subject more from a social than a legal point of view, because it is a social question which must win public opinion before it can obtain legislative action. In the belief that the opinions I here express are just and reasonable I have put them forth, and so believing I commend them to the candid consideration of thinking men.



THE LAW OF LIFE INSURANCE

A COURSE OF LECTURES DELIVERED BEFORE THE LAW
SCHOOL OF THE UNIVERSITY OF THE CITY OF NEW
YORK IN 1891, THE LECTURER THEN BEING THE
GENERAL SOLICITOR OF THE MUTUAL LIFE
INSURANCE COMPANY OF NEW YORK



THE LAW OF LIFE INSURANCE

FIRST LECTURE

THE subject of Life Insurance law has become one of such importance that I shall make no apology and but little explanation in requesting your attention to the brief outline of it which I propose to lay before you. The Life Insurance companies of this country alone now possess accumulated funds of more than three quarters of a billion of dollars; their policies in force are more than a million in number, providing an indemnity of more than three billions of dollars, and their operations extend not only all over the United States, but through the greater part of the civilized world. An institution of such magnitude, involving the pecuniary fortunes of so many thousands of individuals, is certainly entitled to respect, and the increasing scale of its operations makes the principles of law by which they are regulated a subject of ever-increasing importance. I shall not attempt, in the time at my disposal, to enter into the details of the methods of the formation of companies, the limitations upon their business, the character of their investments, or the supervision exercised by the State authorities, as these are matters which are regulated by statute and differ in the several States; nor shall I attempt in my citations of authorities to go often

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beyond the courts of this State or the Federal tribunals, and even then shall confine myself to the mention of one or two, illustrating each point, as I propose rather to give a general view of the entire subject than to minutely discuss any particular question. Other States, as you will find if you pursue the subject, have from time to time passed laws — some of the most absurd and inequitable character — regulating the terms on which a contract of insurance may be made by a foreign company within their limits. But whatever these statutes may be, the companies concerned have no alternative but to submit to their requirements, or withdraw from the State enacting them. The Supreme Court of the United States some years ago decided, in the case of *Paul vs. the State of Virginia* (8 Wallace, 168), that corporations are not citizens within the meaning of that clause of the Constitution which declares that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, nor do they come within the clause which declares that Congress shall have power to regulate commerce with foreign nations and among the several States; that they are creatures of local law and have not even an absolute right of recognition in other States, but depend for that and the enforcement of their contracts upon the assent of those States, which may be given accordingly on such terms as they please. This doctrine has since been adhered to by that court and produced, in the fulness of time, a somewhat paradoxical result. The State of Wisconsin provided by statute that no Fire Insurance company should transact business in that State unless it should first appoint an attorney in the State

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on whom processes of law could be served, with an agreement that such company would not remove the suit for trial into the United States Circuit Court or Federal Courts. On an appeal to the Supreme Court Mr. Justice Hunt delivered an opinion holding that the statute was repugnant to the Constitution of the United States and the laws in pursuance thereof, and was illegal and void, and further, that the agreement of the insurance company filed in pursuance of the act derived no support from a statute itself unconstitutional, and was as void as it would be had no such statute been passed. The Judge says: "Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights. In a criminal case he cannot, as was held in *Cancemi's case* (18 N. Y., 128), be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration or to the decision of a single judge; so he may omit to exercise his right to remove his suit to a Federal tribunal as often as he sees fit, in each recurring case; in these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented." (*Insurance Co. vs. Morse*, 20 Wallace, 445.) Relying upon this decision the Continental Insurance Company filed a bill in the Circuit Court of the

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United States for the Western District of Wisconsin setting up the act in question, that the company had removed a case to a Federal Court in disregard of its agreement, and that the Secretary of State thereupon threatened to revoke its license to do business in that State. The company applied for an injunction restraining the Secretary from taking such action. A decree was entered in the Circuit Court making the injunction perpetual, and an appeal taken to the Supreme Court. (See *Doyle vs. Continental Insurance Company*, 94 U. S., 535.) In this case also Mr. Justice Hunt delivered the opinion, which was in effect that if the State has the power to do an act its intention or the reason by which it is influenced in doing it cannot be inquired into. "Thus the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked for the reason that it removed the case of Drake from the State to the Federal Courts. If the act of an individual is within the terms of the law, then whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world. The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining

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the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, and it cannot be applied to the affairs of life.

“If the act done by the State is legal and is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.” So, to sum up the matter, the case stands, as stated by the learned Justice: “The effect of our decision in this respect is that the State may compel the insurance company to abstain from the Federal Courts or to cease to do business in the State, which gives the company the option. It is justifiable because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and — without reference to the injustice and prejudice or the wrong that is alleged to exist — must determine the question. No right of the complainant under the laws of Constitution of the United States by its exclusion from the State is infringed, and this is what the State now accomplishes.” In other words, the companies have no rights whatever outside of the State which creates them, and if they wish to do business in other States must accept whatever terms and limitations upon that business, or the method of transacting it, which the State harboring them may see fit to impose. Of course, in saying they have no rights whatever, I refer to the right to carry on the business for which they were organized, and must not be understood as stating that they could, for example, be deprived of property

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which they had acquired in such States, with their consent, by a subsequent change of State policy. But by these two decisions it appears that while a statute may be absolutely void, as repugnant to the Constitution and laws of the United States, the State may proceed to enforce it as if it were valid.

Stated in its simplest form, a contract of Life Insurance is one in which one party, called the insurer, in consideration of the yearly payment of a certain sum called the premium by the other party, known as the insured, during his life, agrees to pay a definite sum to his representatives or nominees upon the occurrence of his death. It will be observed, as stated by Mr. Justice Strong, in the case of *Insurance Company vs. Statham* (93 U. S., 24), that this is a peculiar contract. "Its obligations are unilateral. It contains no undertaking of the assured to pay premiums, but merely gives him an option to pay or not, and thus to continue the obligation of the insurers or terminate it at his pleasure. . . .

"In my opinion, the true meaning of the contract is that the applicant for insurance by paying the first premium obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life upon payment of the same annual premium, if paid in advance." Thus the insured is under no obligation to continue his payments, and can allow his policy to lapse at any time, while the insurer must fulfil his obligation if the premiums be regularly paid. As those allowing their policies to lapse would naturally be the robust and healthy, who feel no need for insurance, while those of impaired health would make every effort to keep their policies in force, there would

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result a constant discrimination to the loss of the insurer did he not provide for a total or partial forfeiture of the premiums already paid on a failure to continue them, and thus furnish the insured a strong pecuniary motive for maintaining a policy once obtained. The premiums must be calculated upon a basis which will cover the expenses of the business as well as the losses by death. For this is the one thing certain to every man, and every policy which is kept in force must sooner or later be paid. To estimate properly the amount necessary to cover the risk recourse must be had to the great law of average. While nothing in the future is more uncertain than the date of the death of any particular individual, few things are more certain than the average number of deaths among ten thousand individuals at any given age, and with increased numbers this average becomes almost a mathematical certainty. It is for this reason that insurance is no longer written to any large extent by individuals, as was formerly the case, but by great corporations which, insuring many thousands of lives, can rely with confidence upon the operation of this law.

It was formerly the practise in England for persons to take out policies upon the lives of others in whose existence they had no other interest, and with whom, as in the cases of great generals and rulers, they had no acquaintance, as a mere gambling operation. This was ended by a statute passed in the fourteenth year of George the Third, prohibiting insurance upon lives except in cases where the persons insuring shall have an interest in the life or death of the persons insured, and this has been followed by the statute of betting

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and gaming in this State, prohibiting all wagers and bets whose success is made to depend upon any unknown or contingent event, provided that the statute shall not be extended so as to prohibit or in any way effect any insurances made in good faith for the security or indemnity of the party insured and which are not otherwise prohibited by law (Revised Statutes, 8th Ed., p. 2218). After the passage of the English act, it was held by Lord Ellenborough, in the case of *Godsall vs. Boldero* (9 East, 72), that a policy of insurance was a contract of indemnity, but this decision was overruled on an appeal to the Exchequer Chamber in the case of *Dalby vs. India and London Life Ins. Co.* (28 English Law & Equity, 312), where it was held that a life policy was not in its nature a contract of indemnity, but was what it purports to be on its face, a contract to pay a certain sum in the event of death, and this doctrine has been adopted in this State, in the case of *Rawles vs. Ins. Co.* (27 N. Y., 282). But to make the policy valid and not obnoxious to the statute just referred to, it is necessary that the beneficiary should have an insurable interest in the life, and the questions arising from this necessity are numerous and perplexing. Every man is presumed to possess an insurable interest in his own life to any amount, since by insuring it he can protect his estate from that loss of future gains or savings which might be the result of his premature death; hence, as they cannot be limited, neither can be the amount for which he may insure; so a wife has an insurable interest in her husband's life (*Baker vs. Insurance Company*, 43 N. Y., 282); a sister has an insurable interest in the life of her brother (*Insurance Com-*

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pany vs. France, 94 N. Y., 561), or, to quote the opinion of Mr. Justice Field in the case of *Warnock vs. Davis* (104 U. S., 775): "It (an insurable interest) may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life."

In this State it is well settled that a policy which is valid in its inception continues to be so, even if the insurable interest of the beneficiary or assignee should subsequently cease. In the case of *Olmstead vs. Keyes* (85 N. Y., 593), Judge Earl sums up the matter as follows, after considering the various decisions on the subject: "The rule, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and *bona fide* transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming, and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it or bequeathing it by will; and it has been well said that if he could not do this life policies would be deprived of much of their utility and value." This doctrine, however, has not

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met with the approval of the Supreme Court of the United States. In the case of *Cammack vs. Lewis* (15 Wallace, 643), a policy of \$3,000 was taken out and assigned by the insured to secure a debt of \$70, the creditor agreeing to pay the premiums. The insured died several months after the policy was issued, and the Court held, in view of the disproportion of the real interest of the creditor to the amount to be received by him, that he could in equity and good conscience only hold the policy as security for what was owing to him when it was assigned and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent. The same doctrine was followed in the case of *Warnock vs. Davis* (*supra*), where the decisions of the courts of this State were especially referred to, and in which Mr. Justice Field, delivering the opinion of the Court, said: "It must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking the assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates one should invalidate the other, so far at least as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject, we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life," and the decision in *Cammack vs. Lewis* was accordingly

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followed. It is difficult to reconcile this language with the opinion of the same court in the case of *Insurance Company vs. Schafer* (94 U. S., 457), where a wife, holding a policy upon the life of her husband, had obtained an absolute divorce from him and continued the payment of the premiums on the policy; the Court held that the cessation of the insurable interest, the policy having been valid in its inception, did not affect the right of the *quondam* wife to its proceeds, and in delivering the opinion of the Court, Mr. Justice Bradley, a distinguished actuary as well as a learned jurist, remarks: "But supposing a fair and proper insurable interest of whatever kind to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained, and there is, then, no good reason why the contract should not be carried out according to its terms," and he concludes by saying, "In our judgment a life policy originally valid does not cease to be so by the cessation of the assured party's interest in the life insured." Under this decision, notwithstanding the cases of *Cammack vs. Lewis*, and *Warnock vs. Davis*, already cited, it would seem that a man having a valid policy on his own life might assign it for a valuable consideration satisfactory to himself, or to secure a debt previously contracted in good faith, and that his assignee would be entitled to collect and hold the amount of the claim when the policy matured, although the consideration might have been inadequate or the debt barred by the statute of limitations. As a matter of practice, where the assignment of the policy is absolute on its face and the assignee claims

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the entire amount payable, no question is raised by the company as to the insurable interest unless the representatives of the insured question the validity or the extent of the assignment and make a claim for all or a portion of the fund.

A contract of insurance is usually made by two separate papers, the application and the policy, which are construed together as one instrument, the policy being issued upon the faith of the statements made in the application. The latter contains all the particulars about the individual applicant which the insurer thinks it desirable to know, such as his name, age, residence, occupation, family history, habits of life, etc., together with a series of questions relating to his physical condition to be answered by the medical examiner who is selected by the company. This is forwarded to its Home Office and if approved a policy is issued, which is returned to the agent for delivery upon payment of the first premium, which gives it full force and effect and completes the contract. As the only safety of the insurer lies in his having full and correct answers to the various questions propounded, so that he can form an accurate judgment of the character of the proposed risk, the applicant is required to warrant the truth of his statements and make the validity of his policy depend upon his accuracy. As you are aware, a warranty must be absolutely true and no ignorance or good faith can excuse or palliate an incorrect answer. As a matter of fact any technical defense based upon a false answer to an immaterial question is very rarely made unless some good reason exist upon the merits for declining payment, yet such a defense is good at law. In the case of *Jeffreys*

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vs. *Insurance Company* (22 Wallace, 47), the insured stated in his application that he was unmarried, when he was actually a married man, and also that no other application for insurance on his life had been made, when as a matter of fact he had before that time applied to the company defendant for another policy, which had been issued. It is only fair to the company to state that the real reason for declining payment was that the insured died of *delirium tremens* soon after the policy was issued, but that fact does not appear in the reported case. It was argued that the insured prejudiced his case by saying he was unmarried, since the married are better risks than the single, and therefore the company was not damnified by the untrue answer. Delivering the opinion of the Court, Mr. Justice Hunt says: "There is no place for the argument either that the false statement was not material to the risk or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal. The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant shall inform it truly whether he has made any other application to have his life insured. So material does it deem this information that it stipulates that

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its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The Company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting the test. It would be a violation of the legal rights of the Company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argue, that it is immaterial whether the applicant answers truly, if he answers one way, to wit: that he is single or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial, but if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives who are embarrassed in their affairs resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory on the ground that nothing can compensate a man for the loss of his life. The jury may be right and the company may be wrong, but the company has expressly provided that their judgment and not the judgment of the juror shall govern. Their right thus to contract and the duty of the court to give effect to such contracts cannot be denied." But it is seldom that a direct falsehood can be shown. Sometimes the answer is literally true and yet intended to convey a false impression,

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sometimes not responsive, sometimes not sufficiently definite. Cases of breach of warranty in making answers frequently arise in response to the questions asked in reference to the use of spirituous liquors. Thus, in *Van Valkenburgh vs. Insurance Company* (70 N. Y., 605) the question asked was did the applicant "use any intoxicating liquors or substances?" It was held that this did not direct the mind to a single or incidental use, but to a customary or habitual use, and the Court further held that it was a question not so indisputably and clearly settled by the testimony as a whole that the insured had been addicted to such use that he could be plainly charged with a fraudulent intent in answering no, and that the question was, therefore, properly submitted to the jury. To a similar effect is the case of *Insurance Company vs. Foley* (105 U. S., 350). In this the questions asked were "Is the party of temperate habits? Has he always been so?" The answers given were, "Yes," and the Court, through Mr. Justice Field, says: "The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits nor would an exceptional case of excess justify the application of this character to him. . . .

"When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetitions of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intem-

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perate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The Court did not, therefore, err in instructing the jury that if the habits of the insured 'in the usual, ordinary and everyday routine of his life were temperate,' the representations made are not untrue within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit."

Similar questions of construction are likely to arise under the interrogatories in reference to any previous serious injury or illness, its nature, duration, etc. There is, perhaps, no trait of character in which the personal idiosyncrasies of individuals are more marked than the effect which a personal injury or an illness produces upon the mind. One man will go to the very verge of the grave with an attack of pneumonia, and on his recovery will refer to it, if he ever thinks of it at all, as a slight cold. Another with a mild attack of summer complaint, will take to his bed for days, and to the end of his life relate with shuddering horror his narrow escape from death by Asiatic cholera. So when these questions are asked the answers will vary according to the character of the applicant. Should an injury or illness be denied, and afterwards proved to have occurred, the question as to whether it was serious or not would be one for the jury. This was held in *Insurance Company vs. Wilkinson* (13 Wallace, 222),

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where the insured had concealed a serious injury caused by a fall from a tree, in which Mr. Justice Miller delivered the opinion of the Court. He says: "It is insisted by counsel for the defendant that if the injury was considered serious *at the time*, it is one that must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries which at the moment are considered by the parties serious are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequences, in a few days, it is clear that the serious aspect of the case was not a true one. Is it necessary to state the injury, and explain the mistake, to meet the requirements of the policy? On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry and the very matters

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which would throw most light on the nature of the injury with reference to its influence on the insurable character of the life proposed.”

It seems to follow, in the opinion of the learned jurist, that the question is properly answered if the applicant for insurance ignores any trivial injury or slight illness to which he may have been subjected, and which has had no lasting or important effect upon his physical condition, and this is, in my opinion, good law as well as good sense. It cannot be expected or required that the man in middle life, at which time most insurance is taken, should recall and recite every sprain or bruise, every cold or colic which he has ever experienced, but only that he should, *uberrimâ fide*, put down the serious and important accidents and diseases which have left permanent traces or effected permanent results on his physical organs or his general health.

This position has been sustained by the Court of Appeals, in the case of *Cushman vs. Insurance Company* (70 N. Y., 72). There the applicant was asked *inter alia* if he had ever had disease of the liver, and answered no. It appeared that he had for a few days been attended by a physician for what the latter considered congestion of the liver. Mr. Justice Earl, in delivering the opinion of the Court, says: “Taking into consideration the symptoms of the sickness, the degree of skill and the extent of the examination of the doctor, the very slight nature of the sickness and the speedy and complete recovery, and all the other circumstances, it was for the jury to determine whether, prior to the insurance, the insured had had congestion of the liver. But even if he

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had had such congestion, it does not follow that, within the meaning of the policy, he had had a disease of the liver. In construing contracts words must have the sense in which the parties used them, and to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application the defendant was seeking for information bearing upon the risk which it was to take — the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders, or functional disturbances, having no bearing upon the general health or continuance of life. Colds are generally accompanied with more or less congestion of the lungs, and in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So most, if not all, persons will have at times congestion of the liver, causing slight functional derangements and temporary illness, and yet in the contemplation of parties entering into contracts of Life Insurance, and having regard to general health and the continuance of life, it may be safely said that in such cases there is no disease of the liver.

“In construing a policy of Life Insurance, it must be generally true that before any temporary ailment can be called a disease it must be such as to indicate a vice in the constitution, or to be so serious as to have some bearing upon the general health and the continuance of the life, or such as according to common understanding would be called a disease; and such has been the opinion of the best writers and judges. Hence, whether the insured had congestion of the

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liver, and whether the congestion was of such a character as to constitute a disease of the liver, within the meaning of the policy, were both questions properly submitted to the jury and their determination thereon is conclusive. The assured also answered, 'no' to the question in the application whether 'he had had any serious disease.' It can hardly be claimed that there was any evidence showing this answer to have been untrue. But whether it was true or not, for reasons above stated, it was at least a question of fact upon all the evidence for the jury." An answer given by the insured not responsive in terms to the interrogatory, and not professing to give the information desired, is presented in the case of *Higgins vs. Insurance Company* (74 N. Y., p. 6), which shows that a defense based upon a breach of warranty cannot be sustained unless a distinct and unequivocal assertion is made which proves to be in fact untrue. In this case the interrogatory was "Name and residence of the family physician of the party, or of one whom the party has usually employed?" Answer: "Refer to Dr. A. T. Mills, Corning, N. Y." Judge Allen, delivering the opinion of the Court, says: "The language of the answer is equivocal; it neither declares Dr. Mills to have been or to be the family physician of the applicant, or that he was the physician whom he had usually employed or consulted, or, if he occupied either relation, which it was.

"It was only upon the ground that the statement constitutes an express warranty and was untrue in fact, that the defense can be sustained. The answer is not responsive in terms to the interrogatory and does not profess to give

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the information asked. If the answer given was not satisfactory to the defendant, a fuller and more explicit answer should have been required. A breach of warranty as upon the affirmance of an untruth cannot be alleged in respect of any answer which does not profess to state any fact. The words of the answer cannot be extended by implication in aid of a defense founded upon a technical breach of warranty beyond the fair import of its language and the intent of the party as indicated by its terms. It is always in the power of the insurer to have an explicit and clear affirmation as to every fact material to the risk, and if answers to the interrogatories are not full and do not give the information called for they cannot be treated as affirmations of facts not stated, although called for by the interrogatories."

The numerous restrictions formerly contained in the policies issued by the great insurance companies of this country have one by one been abandoned, and the policy itself is now usually a simple promise to pay the amount of money called for at maturity, provided the premiums be promptly paid when due. The application contains the restrictions imposed, and these are generally limited to prohibiting certain hazardous employments, residence in the tropics or death by the voluntary act of the insured within two years from the date of the policy. I do not think it necessary to take up your time by going over the decisions upon the restrictive clauses as they formerly existed, partly because the policies containing them are rapidly passing out of existence, by death or maturity, and partly because most of the large companies grant to their old policy-holders the

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advantages of the new form upon request. A question which has been a subject of much discussion in the courts is what degree of insanity will excuse a man who commits suicide, or rather at what stage of mental impairment does his act cease to be voluntary. One of the earliest decisions upon this subject is the case of *Breasted and others, Administrators, etc., vs. The Farmers' Loan and Trust Company*, reported in 8 N. Y., 299. Mr. Justice Willard, in delivering the opinion of the Court, says: "It was not contended on the part of the defendant that the policy would be avoided by a mere accidental destruction of life by the party himself. It was urged that it would be if the act was done intentionally, although under circumstances which would exempt the party from all moral culpability. It was insisted that the expression must be taken to mean a death *by his own act*. It seems to me that this is a yielding of the whole question. An insane man incapable of discerning between right and wrong can form no intention. His acts are not the result of thought or reason, and no more the subject of punishment than those which are produced by *accident*. The acts of a madman, which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house joiner, had accidentally fallen through an opening in the chamber of the house he was constructing, and lost his life, the argument concedes that the insurer would be liable. The reason is that the mind did not concur with the act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act? It must occur

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to every prudent man seeking to make provision for his family by an insurance on his life that insanity is one of the diseases which may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason. Nor did they in terms insure him against small-pox or scarlet fever, but had he died of either disease no doubt the defendant would have been liable. They insure the continuance of his life. What difference can it make to them or to him whether that life is terminated by the ordinary course of a disease in his bed or whether in a fit of delirium he ends it himself. In each case the death is occasioned by means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent responsible for his acts." The learned Judge goes on to say: "At the time this case was decided by the Supreme Court on the demurrer there had been no case either in this country or in England in which the same question had arisen. The case of *Borra-dale vs. Hunter* (5 Man. & Gr., 639), decided by the English Common Pleas in 1843, has since been reported. That action was brought by the executor of the insured upon a life policy containing a proviso that in case the assured should die by his own hands or by the hands of justice or in consequence of a duel the policy should be void. The insured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he *voluntarily* threw himself into the water, *knowing* at the time that he should thereby destroy his life and intending thereby to do so: but at the time of committing

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the act he was not capable of judging between right and wrong. It was held by a majority of the court, Chief Justice Tindal dissenting, that the policy was avoided, as the proviso included all acts of *voluntary* self-destruction and was not limited by the accompanying provisos to acts of felonious suicide. The three Judges who formed the majority laid the main stress upon the fact that the jury found the act of self-destruction to be *voluntary*, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case have not found that the intestate acted *voluntarily* or that he *knew* the consequences of his act. They merely find that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If *Borradale vs. Hunter* were an authority which we ought to follow, it differs so much from the case before us that we are at liberty to decide it upon principle.

“Afterwards the case of *Schwabe vs. Clift* was tried at *Nisi Prius*, before Cresswell, J. It was upon a policy upon the life of the plaintiff's intestate, containing a proviso that if the assured should *commit suicide* or die by dueling, or by the hands of justice, the policy should be void. The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show that at the time he took the sulphuric acid he was in part of unsound mind. In his charge to the jury the learned Judge said that to bring the case within the exception it must be made to appear that the deceased died by his own *voluntary* act; that at the time

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he committed that act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing, and that, therefore, he was at that time a responsible being (2 Car & Kerwin, 134). This case was afterwards brought into the Court of Exchequer Chamber on bill of exceptions, found in 3 Man. & Gr. 437 by the title of *Clift vs. Schwabe*. That Court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous: for that the terms of the policy included all acts of *voluntary* self-destruction, and, therefore, if A voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent.

“This case is open to the same remark as *Borradale vs. Hunter, supra*. It turned upon the assumed fact that the act of the suicide was voluntary, a fact not found by the referee in this case.” This reasoning prevailed with a majority of the Court and was adopted as their opinion by a vote of five to three. But in the case of *Van Zandt vs. Insurance Company*, reported in 55 N. Y., 139, where the policy contained the condition that in case the assured should die by his own hand it should be void, the Court, per Mr. Justice Rapallo, returned to the rule established by the English cases and questioned the soundness of the doctrine laid down by Judge Willard. Judge Rapallo says: “A finding, in the language of the request in the present case, that the deceased had sufficient power of mind and reason to understand the physical nature and consequences of the act, and that he committed it voluntarily and wilfully and in

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pursuance of the purpose and intention thereby to cause his own death, would have established that insanity did not exist to such a degree as to prevent him from forming an intention, or being conscious of the act he was doing. It would have established that his mind did concur with the act, and that this, being voluntary, was not the result of any insane impulse or want of power of self-control. Whether so much power of reasoning and self-control could be left in a mind so impaired as to be incapable of appreciating the moral obliquity of the crime of suicide is rather a scientific than a legal question. Judge Willard, in the *Breasted* case, expresses the opinion that a man so insane as to be incapable of discerning between right and wrong can form no intention. This, it must be observed in passing, is a much broader proposition than that the failure to appreciate the wrong of a particular act evinces a total deprivation of reason. The loss of moral sense even to that extent in one who had previously possessed it would undoubtedly be a fact bearing strongly upon the question whether he retained his other faculties. But in the practical administration of justice, in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether, from disease, his mind had ceased to

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control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind had become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life voluntarily and intentionally — perhaps with the very object of securing to his family the benefits of an insurance upon his life — it is difficult to say that it is not a death by his own act within the meaning of the policy. It has been doubted whether public policy would permit an insurance covering a case of intentional suicide by the insured while sane, but however this may be, no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the insured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insured and the insurer. When nothing is said in the policy with respect to insanity, the words, 'die by his own hand,' in their literal sense comprehend all cases of self-destruction. The exceptions which have been engrafted upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates to the assured a pecuniary interest in his own death. To a man laboring under a pressure of poverty, and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations, or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of

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risk arising out of this temptation is the object for which the condition in question is inserted. The condition, therefore, is to be so construed as to exclude only those cases in which these motives could not have operated — such as accident or delirium. So far as considerations of public policy have any place in determining such a question they are undoubtedly in favor of confining the exceptions to the condition to cases in which the self-destruction is clearly shown to have been accidental or involuntary. I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional or unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse or want of power of will or self-control, is sufficient to take the case out of the proviso.”

Among the authorities relied upon on the argument of this case was *Terry vs. Insurance Company* (15 Wallace, 580), in which the then existing authorities on this subject are elaborately considered and discussed by Mr. Justice Hunt. He holds the rule to be that “if the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and

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effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

Commenting upon this decision, Judge Rapallo says: "The opinion contains some general language which goes far beyond the charge in the Circuit Court and was not necessary to sustain the judgment. I refer to that part of the opinion which is relied upon in the points of the respondent in this case, and in which the learned Judge says (citing the language I have just quoted):

"The precise effect of this passage is not very clear to us, as it includes several conditions which can hardly co-exist. It can be conceived that the act might have been voluntary, and the self-destruction intentional, though the assured failed to appreciate its moral character; but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so far impaired that he was not able to understand 'the general nature, consequences and effect of the act he was about to commit,' or when he was impelled thereto by an insane impulse which he had not the power to resist.

"Even if the decision in the *Terry* case were an authority binding upon us, we should not regard it as overruling the case of *Borradale vs. Hunter* and kindred cases."

Acting upon the suggestion made by Judge Rapallo in the *Van Zandt* case, the companies inserted in their policies after the words, "if the insured shall die by his own hand," the clause, "sane or insane," and this came up for consideration

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in the case of *De Gogorza vs. Insurance Company* (65 N. Y., 232), argued before the Commissioners of Appeals in May, 1875. The opinion was delivered by Commissioner Reynolds, who, after discussing the various cases on the subject, goes on to say: "So far, therefore, as we can be aided by judicial decisions, they appear favorable to views which are commended to our judgment. We do not, however, place reliance upon them further than they appear to be fortified by reason. We prefer to place our decision upon the ground that the words of the proviso in the policy before us, by plain rules of interpretation, exempt the defendant from liability. That this language, in view of previous decisions, was inserted for such a purpose cannot be doubted, and that it was agreed to by both the insured and the insurer is not questioned, and that it is a provision allowed by law no one denies. We are to say from these words what the parties must have intended, and we cannot properly say that additional words having no meaning were inserted in the contract: and if they mean anything it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind, the insurer may go free. We are not altogether unmindful of the force of the proposition that a man does not die by his own hand who has not sufficient mind to will his own death, and it is not, perhaps, entirely easy to see in what precise words in our language the idea may be accurately and artistically expressed that a totally insane man may take his own life. But the question seems to involve more the refinement

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of language than the application of practical sense, and we are of the opinion that in the common judgment of mankind it will be considered that when a totally insane man blows his brains out with a pistol, he will be said to have died by his own hand within the meaning of a policy such as we have now under consideration." This clause, having thus been sustained, and never successfully questioned in any other court, is a protection to the insurer against death by suicide, but where the words "sane or insane" are omitted it is practically impossible to establish to the satisfaction of a jury that the self-destruction was deliberate and intentional. The rule in the *Terry* case has now been substantially adopted in this State in the case of *Newton vs. Insurance Company* (76 N. Y., 429), and under that rule the question of the insanity of the insured is always one which must go to the jury. The insurer is liable if the insured, when he took his life, was carried away by an insane impulse which he could not resist, and the jury are apt to argue that the fact that he did not resist the impulse proves at once that it was an insane one and that it was irresistible. Whether a *warranty* that the insured will not die by his own voluntary act will require a broader construction of the language used, and relieve the company from its obligation if that warranty be broken, is a question still undecided, but the weight of authority would seem to be that, whether warranty or condition, the insured does not die by his own voluntary act if the facts bring his case within the rule which we have stated, as established by Mr. Justice Hunt in the *Terry* case.

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SECOND LECTURE

When a loss incurs under a policy, the claimant is required by its terms to furnish satisfactory proofs of death. These consist of certificates from the attending physician, the undertaker, and the beneficiary named in the policy or other person entitled to the fund, setting forth the title of the claimant, and the details of the illness, death and burial of the deceased. It may happen that the certificate of the attending physician, or the evidence produced at the Coroner's inquest, shows the claim to be invalid, as for example where the physician testifies that he has been the medical attendant of the deceased for a period long antedating the application, when the application itself denies such attendance, or where death occurred at a place or in a manner forbidden by the policy. In this case the question at once arises, if the claimant is concluded by the statement made in the proofs so furnished by him. This is answered by the decision of the Court of Appeals in the case of *Goldschmidt vs. Insurance Company*, reported in 102 N. Y., 486, where the Coroner's inquest found that the insured had committed suicide. It was claimed on the trial that as the copy of the proceedings of the inquest given in addition to the proofs required by the policy made out a case of suicide, the plaintiffs should be required to show that this finding was erroneous, and that the burden of proof was upon them. Judge Danforth says: "I can discover no principle upon which such a proposition can stand. The policy made no provision for it. The original proceedings would not be evidence upon the

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issue. Its verity is not admitted by the claimants; it is denied. It could not have been required by the defendants; it was not adopted by the plaintiffs, but, out of what must now seem ill-advised courtesy, was furnished to the defendants at their request. It contained matter which, if properly substantiated, would have availed the defendants in maintaining an affirmative defense, but in no view suggested to us by the learned counsel for the respondents could it, as now presented, change the burden from them to the plaintiffs. If, by any process of reasoning, any part could be taken as an admission of the plaintiffs, it must be taken as a whole, and so taken is no concession of any fact, but a mere communication of hearsay evidence, the truth of which is at the same time denied; enough to put defendants upon inquiry, but in itself is no answer to the plaintiffs' claim even in the first instance." Again, it may happen that no positive proofs of death can be furnished. The insured may have gone to sea in a vessel which never reached port; he may have taken passage on a railroad train which met with an accident, in which the cars and their contents were so entirely destroyed that identification of the remains or even of personal effects was impossible, or he may simply have disappeared from the sight of men without leaving any trace of his whereabouts or any grounds for a reasonable conjecture as to his movements or his fate. All of these cases have occurred, and each particular one must be decided on its own merits upon the best evidence obtainable. As regards disappearance, simply, without explanation, and unaccompanied by any circumstances of especial peril to life, the rule is established that a

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presumption of death does not arise until that absence is continued for a period of seven years. The subject is elaborately treated by Surrogate Bradford in *Eagle's case* (3 Abott's Practice, 218), in which, after a full examination of the authorities, he sums up the matter as follows: "There can be no doubt that, under certain circumstances, this is to be treated as a question of fact, and the language of Lord Denman is in that view strictly pertinent when he says: 'Nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact without reference to accompanying circumstances — such, for instance, as the age or health of the party. There can be no such strict presumption of law.' What, however, is a court or jury to do when there are no accompanying circumstances — when there is no ground in fact for inferring death at any particular time? The question is not whether those presumptions are rigid and strict, but whether there are any such presumptions, and if so, what is their effect when there is an entire dearth of evidence tending to guide the conclusion as to life or death. Confessedly, before the analogy drawn from the statutes of bigamy and life tenancies prevailed, it was a rule of evidence to presume life, unless the contrary was shown. That rule still continues, except so far as it has been modified by the presumption, drawn from the statutes, of death, after seven years' absence without intelligence. The practical effect of these two rules, if both are to be taken as subsisting, is that whenever the law is invoked as to rights depending upon the life or death of the absent party, he is to be deemed as living

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until the seven years have expired, and after that is to be deemed as dead. Not that the law finds as a matter of fact that he died on the last day of the seven years, but that rights depending on his life or death are to be administered as if he had died on that day. It is impossible to say when he died, or even to assert as a matter of fact that he is dead; but in the absence of all evidence the law will account him as dead at a certain time and not before. This is an artificial rule, and of course cannot be expected to square with the actual fact. It is the logical result of the presumptions, founded upon reasons of convenience, and the necessity of fixing upon some limit within which the relations of the living to the absent are to be determined, more than upon any strong probabilities. This is the meaning of our statute in respect to life estates, which declares that if the life-tenant shall absent himself for seven years, and his death shall come in question, 'such person shall be accounted naturally dead,' in any action concerning the lands in which he had the estate for life, unless sufficient proof be made that he is still living. (1 Rev. Stats. 749, Sect. 6; see Bigamy, 2 Rev. Stats. 687, Sect. 91.) He shall be accounted dead. The statute so treats, just as the Common Law treated and accounted, him living until his death was proved. In neither case can it be said that his life or death has been actually proved, but in both cases it may be said that he shall be accounted living until by reason of his absence the law accounts him dead; and, for the purposes of justice, the rights and relations of the parties affected by his life or decease shall, in the absence of information, be determined, by this technical presumption.

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“This certainly seems to me the most consistent and symmetrical rule; and when it is regarded as a dry legal doctrine adopted for the purposes of convenience, and from the necessity of having some limited period for the determination of the rights of absent persons, and not as a determination upon the death or the real time of the death, there would appear to be no grave objection against it. I am inclined to hold, therefore, that in the case of absent persons it is within the province of the Court or jury to infer from circumstances, if any appear in proof, the probable time of death, but that if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted, in all legal proceedings, as having lived during that period.”

Under this rule it would be necessary for the beneficiary or assignee of a policy on the life of a person who had disappeared without leaving any clue to his destination or any reason, aside from such disappearance, to suppose him dead, to continue the payment of the premiums for the seven years following such disappearance before he could claim the amount payable on the policy. At the expiration of that period, the presumption being that the insured was dead, it would devolve upon the insurer to prove that he was still living, or that he died under circumstances which avoided the policy.

Where the policy is payable to the insured, his executors, administrators or assigns, and there has been no assignment of it, the executor or administrator duly appointed by the

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Probate Court is the proper claimant. I have already discussed to some extent the matter of a claim by an assignee, and where the beneficiaries are named in the policy it is not always an easy matter to determine the proper person entitled to the fund. In the case of *Bickerton vs. Jaques* (35 N. Y. Supreme Court, 129) the policy was taken out by the insured upon his own life, payable upon his death to his sister Elizabeth. She died during his lifetime and he surrendered the policy, taking out another for the same amount payable upon his death to his nephew David. He always retained the policies in his own possession, paid the premiums when due upon the first one, and allowed the dividends declared upon the second to be applied to the payment of the premiums accruing upon it. After his death a question as to the title to the policy arose between the administrator of the deceased sister and the nephew, and the controversy was submitted to the General Term upon an agreed statement of facts. Judge Daniels, in delivering the opinion of the Court, says: "No decisive authority has been found in favor of the position taken by the plaintiff (the administrator), the cases affecting the right of the person obtaining the policy to surrender it and receive another payable in a different manner in lieu of it having generally arisen under the terms of the statute made for the benefit of the widow and children. These cases are not applicable to the present controversy, because the language of the statute is not broad enough to include it. Its disposition is therefore dependent upon the legal principles necessarily applicable to such a transaction, and according to them it should be governed by

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the intention of the person obtaining the insurance so far as that is capable of being gathered from the attending circumstances. That he did not intend to place the insurance irrevocably beyond his own control is manifested with reasonable clearness by the fact that he always retained the possession of the policy himself, and he, and not his sister, paid all the premiums which were paid upon it. And after such payments were made, the insurance was kept up by the dividends which had been declared and credited to it under the rules and regulations of the company. In addition to these circumstances the person to whom the first policy was made payable was the sister of Henry H. Jaques (the insured), by whom it had been obtained. She had lived with him, taking care of his household and family for many years prior to her own decease, and she was entirely dependent upon him for her support and maintenance. It is reasonably plain from these facts that his intention in procuring the policy was to provide for her after the time of his own decease and when, by reason of that event, he would be incapable of affording her any further assistance. This was probably the sole and only intention by which he was actuated in procuring the insurance and from that it must necessarily follow that her right to it was designed to be contingent upon her surviving him. That is the only fair and rational construction to be placed upon the transaction. It embodied a provision for her support when by his decease he would be unable to provide for it, and the occurrence of her death before his own defeated the object and purpose by which he had been actuated in taking out the insurance. Her

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administrator had no special claim upon his bounty, neither did any of her next of kin, and no reason, therefore, can be discovered for the existence of any disposition on his part to provide for them in case she herself failed to become entitled to the money. His primary and substantial purpose was to secure the means of sustaining his sister after his own decease, and as that purpose was defeated, he was left at liberty to deal with the insurance as he himself deemed to be proper; subject to the benefit and interest to be secured by it to his sister after his own decease, it was his property. The premiums had been paid upon it by him, and as it could not be used as he intended it should when he obtained it, and during the time he made these payments upon it, he had the authority to give it another and different direction," and the nephew was therefore adjudged entitled to the fund. This case was not appealed but has been cited with approval in the Court of Appeals (see *Whitehead vs. Insurance Company*, 102 N. Y., 143), and may, I think, be accepted as settled law in this State. A somewhat similar question arose in the case of *Olmstead vs. Keyes* (85 N. Y., 593). There the insured took out a policy payable to the plaintiff, John Olmstead, as trustee for Huldah Keyes, the wife of the applicant. She died intestate in November, 1857, leaving several children, and thereafter, in August, 1861, the insured again married, and in 1864, the plaintiff, upon the request and direction of the insured, assigned to the second wife all his right, title, and interest as trustee of Huldah Keyes in the policy. A controversy arose practically between the assignee (the second wife) and the children of the first wife. The

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opinion of the Court was delivered by Judge Earl. The Judge cites the general rule of the Common Law, "that all the choses of the wife not reduced to possession during the joint lives passed to the husband upon her death — all without any exception — and there is no authority to the contrary," and goes on to say that "this is true whether said choses are then payable or are mere reversionary or contingent interests payable at a future day or mere possibilities." Upon this principle, "the wife's interest in this policy was a chose in action; at her death it passed to her husband. He then caused it to be assigned to his second wife, Mary L., and thus, within the meaning of the law, he reduced it to possession. The assignment was valid as against him, and was, therefore, valid against the whole world. The written assignment is expressed to have been for value received, and in the absence of proof to the contrary must be assumed to have been, but whether it was for a valuable consideration or not it was good as against him and that is sufficient, as the rights of a surviving wife are not in question. Had the chose in action been a note payable at his death, his assignment thereof would have been valid, and for precisely the same reason his assignment of this policy was valid.

"There is no case which holds that a life policy for the benefit of the wife, her husband surviving, passes by the rules of the Common Law to her personal representatives for the benefit of her estate, to the exclusion of her husband. On the contrary, it is stated by the Chancellor in *Moehring vs. Mitchell* (1 Barbour's Chancery, 264, affirmed in the Court of Appeals, 4 Howard's Practice, 292), that a

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policy upon the life of a husband for the benefit of a wife, in a case where the wife dies first and then the husband, passed, like other choses of the wife, to the personal representatives of the husband. In that case the general rule as to the survivorship to the husband of the choses of the wife was applied to the policy of insurance taken by her upon his life. Even if it were true that, upon the death of Huldah, this policy could remain valid only in the hands of some person having an interest in the life insured, here it passed to her husband and then to his second wife, and both had an interest in the life insured."

Very many questions have arisen under the act in respect to insurance on lives for the benefit of married women, passed April 1, 1840, and the several acts amendatory thereof. This statute provides in effect that a husband may insure his life for the benefit of his wife or his children and that, no matter what his financial condition may be, he may pay a premium not exceeding \$500 per year, and the insurance so obtained shall be exempt from any claims of his creditors. These policies are usually made payable to the wife, if living at the death of the insured, and in case of her previous decease to her children or their guardian. The most important question under this act, and one still unsettled, is whether the children of a deceased child take the share of their parent in the policy. It was very fully considered by the Supreme Court of Connecticut, in the case of *Insurance Company vs. Palmer* (42 Conn., 60). The Court there says: "The moment this policy was executed and delivered it became property and the title to it vested in some one. It will not

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be claimed that it vested in the person whose life was insured. It must have vested, then, in all or a part of the payees. The payees consisted of two parties, the wife and the children. As only one could take and enjoy the property, ultimately, it did not vest in all as tenants in common, nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy nor a naked possibility, but it was a possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment, and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent but subsequent. The title vested in point of right immediately, but was liable to be divested upon the happening of a subsequent event. The right to the policy in a strict sense was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties, to the wife as well as to the children. Her enjoyment of the fund depended upon her surviving her husband; the children's, upon her husband surviving her. In respect to each it was a then present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and it was certain to be defeated as to one of them. That such a right is recognized as property and is transmissible to heirs is a proposition abundantly established by the authorities." This doctrine has been followed in this State, in the case of *Hull vs. Hull* a Special Term decision made by Judge Larremore of this

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city, and reported in 62 Howard's Practice, 100. The case was not appealed, and this view has never been adopted by the higher courts. The case of *U. S. Trust Co. of New York vs. Insurance Company* (115 N. Y., 152) appears to differ. In this the wife died, leaving her surviving her husband, and three children, one of whom subsequently died before her father, leaving three children, and another died intestate and without issue, leaving her surviving her husband, to whom letters of administration were issued. The insurance company paid one third of the amount of the policy to the surviving child, one third to the administrator of the deceased child, and the other third to the guardian of the three grandchildren.

The plaintiff in this suit, as guardian of these infants, sued the Company to recover the amount paid to the administrator of the deceased child, claiming that such payment was wrongfully made. Judge Earl says: "We find no language in the policy insuring any one but Mrs. Finn and the children of Mr. and Mrs. Finn. If Mrs. Finn survived her husband (the life insured) the sum mentioned in the policy was payable to her. When she died before her husband the only persons interested in the policy were her children then living, and the whole policy as a chose in action belonged to them. They held vested interests therein, as they could in any other chose in action, payable at a future time. It is true that it was the purpose of the act of 1840 to enable the husband to make a provision for his family; but how that provision should be made was to be determined by the parties to the policy. The insurance could be for the benefit of the

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wife alone, in which case the amount insured would upon the death of the husband be payable to her if she survived; but if she died before him it would then vest in and be payable to her personal representatives and not to her children. So, too, the insurance could be made payable to the child; in which case upon the death of the father it would be payable to the personal representatives of the child, if dead. Her grandchildren are not named and their names cannot be put into the policy. In the event that has happened the policy might be construed, and is payable precisely as if the children alone had been named therein. Therefore when Mrs. Miles died her interest in the policy passed to her administrator as her personal representative and as part of her personal estate, and upon the death of Mr. Finn, one third of the policy was payable to the surviving child, one third to the administrator of Mrs. Miles, and one third to the administrator of Mrs. Anthon. The children of Mrs. Anthon, as such, could have no standing to maintain an action to recover any sum due upon the policy. But even if they could, their full share has already been paid to them." So far, you will observe, the decision of the Court does not differ very materially from the doctrine in the Palmer case, it being only to the effect that the persons entitled to the interest of the deceased child are the personal representatives, and not the children. But the learned Judge goes on to say: "If, however, we assume that we are wrong in this construction of the policy, then upon the death of Mrs. Finn the policy was payable to her children as a class, and those of the class would take who were in being at the time when the policy became payable, and in no

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event could grandchildren be included in the class. In that case the whole policy would be payable to the only survivor of the class, to wit: Caroline C. Finn." It is well settled in this State that the word children in a will does not include grandchildren (see *Palmer and others vs. Horn*, 84 N. Y., 516). And it is probable that the learned Judge had this rule in mind in stating the dictum which I have just quoted.

The same question has recently been presented and decided at a Special Term of the Supreme Court in Albany County by Mr. Justice Mayham, in the case of *Walsh vs. Insurance Company*. Here the wife had three children, one of whom died before her mother, leaving her surviving her husband and two children, and another died after the mother, leaving him surviving a widow and two children, and letters of administration were issued to the widow. After the death of the insured, who survived his wife, one third of the policy was paid to the surviving child, one third to the administratrix of the deceased child, and the other third, which in the opinion of the company's counsel belonged to the representatives of the child who died during the lifetime of her mother, was retained in the possession of the company to be paid to those representatives on demand. A suit was brought by the assignee of the surviving child and the administratrix to recover the amount. The principal question in the case was whether the child who died before her mother took any interest in the policy which would pass to her personal representatives or children. The learned Justice dissents from the doctrine of the *Palmer* case, holding that

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“this policy was procured on the application of, and the payment of the premiums by, Rica Traub (the wife of the insured), and was by its terms for her sole use. No other person or persons had any interest in it or in its proceeds if she survived her husband. On the execution of the policy she took a vested interest in the proceeds which could only be divested on the happening of the event of her death before that of her husband. The interest of her children was contingent upon her death before that of her husband, and but for the happening of that event the children could have taken nothing under this policy. In *Whitehead vs. Insurance Company* (102 N. Y., 141) the policy provided that the proceeds of the policy should belong to the wife and, in case of her death before the one on whose life it was taken, then to the children. The wife died before the husband on whose life the policy was made. An action was brought by one of the children, and the Court in discussing the case says: ‘The wife, therefore, in this case had a vested interest in the policies at the moment of their delivery, by force of the statute which permitted them to be made in their existing form.’ None of the children in that case died before the mother, and the only question in that case which is applicable to this is as to the wife’s interest under the policy at the time of its execution. The vested interest which the wife, in that case and in this, took was in the whole policy and to the right to the whole of the proceeds of the same, and that vested interest could only be divested by her death before her husband. That event had not occurred at the time of the death of Bessie Gross (the child who died during the

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lifetime of her mother), and at that time she could have had no vested interest in the same. There was nothing, therefore, at that time for the personal representatives to take, and as she had no vested interest her next of kin acquired none by her death. Her children, who were the grandchildren of Rica Traub, were not named in the policy, and as was said in *U. S. Trust Co. vs. Insurance Company, supra*: 'Her grandchildren are not named, and their names cannot be put in the policy.'" This case is not yet reported, but an appeal is to be taken, and it is to be hoped that an authoritative decision will be rendered which will relieve the companies of all further embarrassment in reference to this question.¹

It has been before the General Term of the Supreme Court in this Department in the case of *Lane vs. De Metz* (66 N. Y. Supreme Court, 462). In this case the policy was payable by its terms to the wife of the insured if living, and if not living to his children or their guardian, and if there be no such children surviving, then to the executors, administrators, or the assigns of the insured. The wife died before her husband, leaving two children, one of whom died before the father, leaving issue. The Court distinguished the *Palmer* case, holding that the provision making the fund payable to the representatives of the insured, in case he left no children surviving him, showed an intention that only such children as survived should take an interest in the policy. The late Judge Brady, who delivered the opinion, does not

¹ This decision was reversed by the General Term — See 39 State Reporter, 710.

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agree with Judge Mayham in holding that the wife took a vested interest in the policy. He says: "It is not doubted that the wife of the insured did not take a vested interest in these moneys. Her right to them depended upon the contingency of her survival of her husband. It is apparent from the provision in the policies that such money was to be paid to her if living, which meant living at the time of the death of the insured, at which time the policies matured and not before. According to the terms of the policies, if the wife of the insured was not living at the time of his death, the amount of the insurance was to be paid to the children of the insured or to their guardian for their use, and if there were no such children surviving, then it was to be paid to the executors, administrators, or assigns of the insured. From this phraseology the conclusion seems to be inevitable that the children of the insured had not nor had either of them a vested interest during the life of the insured; it being expressly provided by the policies that if there should not be any surviving children of his, the insurance money should go to his executors, administrators, or assigns." So we must await the decision of the Court of Appeals before knowing whether, in this State, the interest of the wife in such a policy is vested or contingent.

Another subject of long-continued litigation in reference to policies of this class is the assignability of such policies by the husband and wife. In the case of *Eadie vs. Slimmon* (26 N. Y., 10) the question was elaborately discussed. The facts in the case would have justified an avoidance of the assignment on the ground of duress, it having been obtained

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from the wife of the insured by threats; but the court preferred to base its decision upon the theory that the policy, being issued under the statute for the protection of married women, could not legally be assigned. Mr. Justice Denio, in delivering the opinion of the Court, says: "By the Common Law a person could insure his own life for any sum for which he might choose to pay the premium, and the insurers would engage to insure. But if one desired to insure the life of another, he could only insure the interest which he had in such other life. If he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual damages sustained, the contract would be void under the statutes against betting and gaming. This principle the legislature, by the act of 1840, relaxed in reference to insurance effected by a married woman for any sum which she and the insurance company might see fit to contract for. It was provided that in the case of her surviving her husband, the amount payable by the terms of the policy should be payable to her for her own use, free from all claims of the representatives of her husband or of his creditors. There is another feature in the act which shows that it was an enabling and not a declaratory provision. By the general rules of law, a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of the *cestui que vie*, or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured, but by this act the contract may be continued in favor

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of the children of the insured wife after her death. These features distinguish this case from that of an ordinary chose in action belonging to a married woman as her separate estate. The provision is special and peculiar, and looks to a provision for a state of widowhood and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife insured under this act could sell or traffic with her policy as though it were realized personal property or an ordinary security for money."

This doctrine, which is really an example of judicial legislation, has since been adhered to by the courts of this State, and in the case of *Brummer vs. Cohn* (86 N. Y., 11) it was extended to a policy payable by its terms to the wife, her executors, administrators, or assigns. The Court, per Judge Andrews, says: "The contention that to bring an insurance by a wife upon the life of her husband within the operation of the act of 1840, it must appear from the terms of the policy, or from extrinsic evidence, that it was the intention of the insured to avail herself of the provisions of the act cannot, we think, be maintained. The right of a wife to insure the life of her husband was not given by that act. She had an insurable interest in her husband's life at Common Law. The amount insured must necessarily be the measure of damages in case of death. The pecuniary interest of a wife in her husband's life is incapable of exact measurement. The insurer, by issuing a policy to the wife, agrees that her interest is at least equal to the sum insured, and the policy is in the nature of a valued policy and the full amount insured is recoverable, in case of death, without proof of actual dam-

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ages. Nor did the provision in the second section of the act of 1840, that the insurance by a wife on the life of her husband may, in case of her death before the decease of her husband, be made payable to her children, confer any new power, or authorize a contract which before the statute would be unauthorized. There does not seem to be any ground to doubt that before the statute a provision in a life policy issued to a wife on her husband's life, that in the event of her death before the death of her husband the policy should inure to the benefit of her children, would have been entirely valid and enforceable. But the act of 1840 did secure to the wife the benefit of an insurance on the life of her husband procured by or for her and in her name, in case she survived her husband, free from any claim by him or his representatives or creditors, subject to the limitation that the annual premium paid should not exceed a specified sum.

“In this respect the act of 1840 is enabling and not declaratory. The act does not require that it should appear by the policy that it was issued under the act in order that the insured should have the benefit of its provisions. There are no restrictive terms. The act is remedial and was passed for the benefit of married women and their children, and the intention of a married woman in insuring the life of her husband to avail herself of its provisions is inferable from its beneficial nature.”

The rule of law thus established produced so much dissatisfaction that the legislature was compelled to interfere, and it provided (by Chapter 341 of the Laws of 1873) that such a policy could be surrendered for its cash value by

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the wife and husband, on complying with certain prescribed formalities, to the company issuing it, or could be assigned by the wife and husband provided there were no children. As this act deprives the children of any rights which they might have in a policy so issued, it has always been considered by counsel for insurance companies to be unconstitutional as impairing the obligation of contracts in respect to policies made before the passage of the act in favor of the wife and children, and to apply only to policies issued since its date. This question, so far as I am aware, has never been presented for judicial construction. By Chapter 248 of the Laws of 1879, it was further provided that any policy payable to the wife could be assigned by her with the consent of her husband, and this is considered valid so far as the interest of the wife herself is concerned. The act came up for construction in the case of *Anderson vs. Goldsmidt* (45 New York Supreme Court, 360. Affirmed in the Court of Appeals in 103 N. Y., 617). The policy is in the ordinary statutory form, payable to the wife if living, and if not, to her children, and the assignment was made by the husband and wife in writing subsequent to the passage of the act of 1879.

Judge Earl says: "Objection is made that there was not in this case, within the meaning of this statute, the written consent of the husband to this assignment. But by uniting with his wife in executing the assignment he consented thereto in writing. It would be taking a very narrow view of the statute, quite inadmissible, to hold that the purpose of the statute was not fully answered by the execution of the assignment in that way. The mere fact that she had children at

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the time she executed the assignment did not render her assignment void. The statute, whether there be children or not, gives the wife, with the consent of her husband, the absolute power to assign or surrender the policy. It is quite true that the children had a contingent interest in the policy which would have become vested in case the wife had died before the policy matured. But here she survived that period, and hence the contingency did not arise which gave the children any interest whatever in the policy. At the time of this assignment there was no law and no public policy which prohibited the wife from assigning any interest which she had in the policy, and by the assignment which she executed plaintiff's testator became vested with the entire interest in the policy, and there is no defense to the plaintiff's claims to the amount due thereon."

The statutory provision that an insurance policy in favor of a married woman or her children is not liable for the debts of the husband has been extended to mean that such a policy is not liable for the debts of the wife. In the case of *Smillie vs. Quin* (90 N. Y., 492) the wife during her husband's life assigned such a policy in trust for the benefit of her children, and the assignment was attacked by her judgment creditors. Judge Earl, delivering the opinion of the Court, after referring to the statute of 1840, says: "The object of that statute, as construed by the courts in cases like this, was to secure the insurance for the benefit of the wife, if she should survive her husband; and in all the cases upon the subject the policies had been assigned out of the family, in violation of the spirit and policy of the law, and in all of them the wife asserted

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her claim against the assignment which had been made. In this case, even if it be conceded the wife could have avoided the assignments of these policies, could anybody else avoid them?

“It would certainly be in violation of the spirit and policy of the law to allow her creditors to come in and avoid assignments which she had made, either for her benefit or the benefit of her children, and thus sweep away the whole insurance. It is sufficient to hold that in a proper case she or her personal representatives can avoid the assignments, and thus at all times claim the benefit which it was the purpose of the statute to secure to her. But if she does not seek to avoid the assignments and reclaim the policies, or to secure the moneys due upon them, she cannot be compelled to. She could take the money upon the policies and give it away; and she could renounce all claim to it and allow any person under her assignments to receive it. She is sufficiently protected if she is permitted to assert the invalidity of the assignments. It will do her no good and do her family no good, if creditors or strangers are permitted to come in and assert the invalidity of the assignments, for the purpose of sweeping away the amount of the insurance. We are, therefore, of the opinion that this defendant, representing judgment creditors of the wife, was not in a position to assail her assignments under the statute of 1840.

“It, therefore, only remains to be inquired whether these assignments were fraudulent as to the judgment creditors, and, therefore, void; and we are clearly of the opinion that they were not. At any time prior to the death of her husband

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she had no interest in these policies which a creditor could seize. If she had, then the policy of the law could be thwarted in every case. She could keep these policies in life if she chose, or allow them to lapse. She was not bound to keep up the insurance, neither was her husband bound to keep it up for her benefit. As she was not in a position to assign the policies to her creditors so as to absolutely cut off her right, her creditors could not take them so as to bar her right, and, therefore, it was no fraud upon her creditors for her to make the assignments at that time to her children. It was like the disposition of property exempt from execution, of which creditors cannot complain."

A question may arise as to the amount to be claimed under a policy. A case of this character has just been decided (*Reigel, Adm^x., etc., vs. Insurance Company*, 140 Pa., 193) by the Supreme Court of Pennsylvania, the Appellate Court of that State, upon a somewhat novel state of facts. There a creditor took out a policy on the life of his debtor and paid premiums for a number of years, the payments being continued by his administratrix after his death. The burden becoming heavy, she surrendered the policy to the company by which it was issued, obtaining for it a paid-up policy for a smaller amount, being the proportionate amount of insurance equivalent to the premiums already paid. At the time of this transaction, both the administratrix and the company had lost sight of the life insured and assumed that he was still living, but it was subsequently ascertained that he had died some ten days before the change was made. She then demanded a restoration of the original policy, and upon the

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refusal of the company to grant her request filed a bill in equity to compel its return to her for the purpose of bringing suit upon it, to which the defendant demurred and had judgment upon the demurrer.

An appeal was then taken to the Supreme Court, and in deciding the appeal the Court, through Mr. Justice Williams, says, referring to the surrender of the original policy: "At the time she made it she was already relieved from the burdensome premiums and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies and give her absolutely nothing for it. She surrendered a policy for \$6,000 on which the liability of the company was already fixed, and received for it one of \$2,500, to secure relief from a burden already removed. The company parted with nothing; she secured nothing. The whole transaction was a mistake, and if the decree of the court below stands, the result will be to take \$3,500 from her and give it to the insurance company. These facts seem to us to present a clear and strong case for equitable relief; so strong, indeed, that the mere statement of them is the only argument necessary for its support. The duty of the Chancellor to relieve in cases of mutual mistake is so well settled that no citation of authorities can be needed. The learned Judge who heard this case in the court below, and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill.

"He treats the arrangement made as a compromise of a

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claim against the company for the alleged death of the insured, which the administratrix was unable to establish, because unable to show his death. As the fact of his death and the consequent liability of the company on the policy were uncertain, it was a case for the application of the doctrine that an adjustment of a doubtful claim constituted a valid consideration for the surrender of the policy and the acceptance of a new one, and upon this theory the decree was entered. But it nowhere appears that she made any claim on the company or supposed that she had any; she asked relief from future payments of premiums on a policy on which she supposed future payments would have to be made, and to get this relief she was willing to sacrifice more than one half of the sum insured. The company was willing, in consideration of this large reduction of its liabilities, to give her a policy for what her payments would purchase and relieve her in future. This is an exchange often made and adjusted by well-settled rules. It was a compromise of nothing. We do not doubt the correctness of the rule applied by the learned Judge, in cases to which it is fairly applicable, but this is not one of them. The plaintiff distinctly avers that she did not know of the death of the insured until some ten days after the exchange of the policies was effected, and that both parties to the transaction were acting in respect thereto on the basis that he was living.

“She distinctly avers that the object of the arrangement was to secure relief for herself from the indefinite payment of premiums that had become burdensome to her; that the new policy was accepted for that reason and the old one

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surrendered at a time when, had she known of the fact, she was entitled to demand the entire sum upon which she had so long and so steadily paid the burdensome premiums. Upon these facts, if the attention of the learned Judge had not been directed from them, we feel sure that he would have reached the conclusion that we have reached — that it would be grossly inequitable to hold the plaintiff to a bargain made under the influence of a mistake of facts like that before us. This mistake the demurrer admits. If there had been any circumstances which the defendant could have set up to show that a correction of this mistake at this time would be inequitable, it would have been shown to the Court by answer.” This opinion was approved by a bare majority of the Judges, the vote being four to three.

THIRD LECTURE

As you are probably aware, the far larger proportion of insurance policies are obtained through the personal solicitations of agents. While every prudent man insures his house or his household goods against the chance of destruction by fire as a matter of course, comparatively few regard as equally necessary insurance on their lives, or, rather, while they all admit its advantage or desirability, the effecting of such insurance is postponed from day to day. So all the companies employ numbers of agents throughout the countries where they do business to solicit risks, and hence has arisen what might almost be termed a conflict between the companies and the insured. The companies, being obliged to employ great numbers of men, of many of whom they can know but little

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at the "Home Office," have endeavored to restrict the powers of those agents within the narrowest possible limits, and by clauses in their applications, policies and published documents bring these restrictions to the notice of the insured. On the other hand, the applicant (it may be the inhabitant of a small country village) knows nothing of the company or its officers in a distant city, and relies entirely upon the agent, with whom he is acquainted and whom he regards as the plenipotentiary, if not the incarnation, of the corporation. The Courts have endeavored to reconcile or rather mediate between these conflicting views, and a few of the cases upon the points decided will be of interest. In the case of *Insurance Company vs. Wilkinson*, reported in 13 Wallace, 222, the trial Judge admitted parol testimony to show that one of the answers in the application was not in fact made by the applicant, but was filled in by the agent from information obtained from other persons. One of the principal points in the case on appeal was the propriety of the admission of this evidence. On this question, Mr. Justice Miller said: "It is obvious that the soundness of the Court's instructions must be tested mainly by the answer to be given to the question, 'Whose agent was Ball (the man who wrote the answers) in filling up the application?'"

"This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible.

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On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land with instructions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent, who has persuaded him to effect the insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that as to all other acts of the agent he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a

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reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receives the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom it transacts business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

“In the 5th Edition of American Leading Cases, after a full consideration of the authorities, it is said:

“‘By the interested or officious zeal of the agents employed by the insurance companies, in the wish to outbid each other and procure custom, they not infrequently mislead the insured by a false or erroneous statement of what the application should contain, or taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.’

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“The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.”

After taking this broad view of the agent's powers, the same Court decided, in *Hoffman vs. Insurance Company* (92 U. S., 161), that an agreement between an agent of an insurance company and an applicant for insurance whereby the former, without authority from the company, accepted, by way of satisfaction of a premium payable in money, articles of personal property, is a fraud upon the company, and no valid contract against it arises therefrom. In this case the agent made an arrangement with the applicant by which he accepted, among other things, in part payment of the premium due the company, a horse valued at \$400. Mr. Justice Swayne, in delivering the opinion of the Court, says: “Life Insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be the same medium. This is the universal usage and rule of all such companies. Goodwin (the agent) had settled his own debt to Hoffman of \$53.67, and had appropriated to himself

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Hoffman's note of \$100. If he had the right to take his percentage in such a way as he might think proper, this did not justify his taking the horse at \$400, nor, if the general agent of the company had expressly agreed to take the horse in payment of a premium *pro tanto*, could that have given validity to the transaction. If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking. The exercise of such a power by the agent was liable to two objections. It was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor the general agent had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. "This objection is fatal to the appellant's case." In the case of *Sands vs. Insurance Company* (50 N. Y., 626) the payment of a premium in January, 1862, to an agent of the company at Mobile, in Confederate Treasury notes, then substantially the only currency of the so-called Confederate States for the general business of those States, was held to be a valid payment.

It may be remarked, incidentally, that the prompt payment of the premiums accruing on an insurance policy is a condition precedent to a recovery, and that nothing but the

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consent or waiver of the company can excuse the failure to make the payment when due. In the case of *Howell vs. Insurance Company* (44 N. Y., 276) the insured was stricken with paralysis on the morning of the day on which the premium became due, and died the next day. Mr. Commissioner Gray says: "The payment of the premium was an act which could have been performed by any other person than the plaintiff's husband (who was the life insured). Its payment did not necessarily depend upon his continued capacity or existence; and hence, although he was, shortly prior to the expiration of the policy, when about to pay the premium, rendered incapable by the act of God, she is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by Omnipotent Power. It is claimed that because Howell was, about two hours before the expiration of the policy, fatally stricken, that he at once relapsed into and remained in a dying condition until the next day, when he died, he was, within the meaning of the policy, dead before it expired. It must be borne in mind that this is not a policy upon property, but upon life. It is not enough that his life was in such peril that no hope was left of a partial recovery, and that, so far as his continued existence could have benefited the plaintiff or her children by any provision he could have made for their comfort, his life to them may in that respect have been worthless. It was not against his ill health or against any attack of apoplexy or paralysis or fatal epidemic that he was insured, but against his death from any cause other than those excepted in the policy. If it were not so, and he had been, on the day before

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the policy expired, in the last stage of consumption, and from that cause in a dying condition, and had died the next day after it had expired, the defendant would have been liable. The length of time a diseased man may, before death, be in a dying condition, whether from sudden attack or long illness, is undefined. Howell might have been attacked two days or more before the expiration of the policy and remained in what is ordinarily understood as a dying condition until a day or more after it expired, and the result would be that, in cases of this kind, if from satisfactory evidence a jury should find that the life insured was stricken with disease and death two days before the policy expired, and lived until after its expiration, the insurer would be liable. And thus, in order that a party for whose benefit a policy is issued may determine upon his rights under it, his first duty would be to consult a doctor to learn whether his patient is in a dying condition, instead of his policy to learn with certainty that, if he is alive when the policy expires, the insurance will terminate." The same point was decided in the *Stathem* case (93 U. S., 24) where Mr. Justice Bradley says: "It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate upon the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means for protecting themselves from embarrassment. Unless it were enforceable the business

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would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to on which the premiums and the amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed except at the option of the company. This has always been the understanding and the practise in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, etc. But this is a matter of stipulation or discretion on the part of the particular company. When no stipulation exists it is the general understanding that time is material and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made when the insured person is *in extremis* to meet a premium coming due demonstrates the common view of this matter. The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such

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be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

Of late years, some companies have inserted in their policies a general clause to the effect that they shall be incontestable after the lapse of two years from the date of their issue, if the premiums be promptly paid. The effect of this stipulation was considered in the case of *Wright vs. Insurance Company* (50 N. Y. Supreme Court, 61), at the General Term of the Fourth Department. Judge Follett says: "The stipulation provides that the validity of the policy shall not be questioned after the death of the insured; and not after two years from the date of its issue. An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a *defense* the falsity of the representations of the insured. But its effect is not to prevent the insurer from *annulling the contract* upon the ground of the fraudulent representations of the insured, provided an action for that purpose is brought in the lifetime of the insured, and within two years from the date of the policy. The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer must test, if ever, the validity of the policy. It is settled that a stipulation in a policy limiting the time within which an action may be brought thereon is not against public policy, and that an action begun after the lapse of

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the stipulated time cannot be maintained. If a stipulation shortening the period within which the statute permits the insured to enforce his rights in the courts is not against public policy, it is difficult to see upon what ground a stipulation shortening the time which the statute and the rules of the Common Law give an insurer to enforce its rights in the courts can be held to contravene public policy. In *Wood vs. Dwarris* (11 Exch., 493), an action on a life policy was defended on the ground that it was issued upon the express condition that if any statement in the application was untrue the policy should be void, and that certain statements were untrue. The plaintiff replied that the defendant issued a prospectus, which came to the knowledge of the insured, stating that all policies were indisputable, except in cases of fraud. The defendant rejoined that the policy and the application formed the contract, and that the prospectus was not binding; but the Court held the rejoinder bad and the stipulation binding. The stipulation in that case did not, like the one at bar, cut off a defense based upon the fraudulent representations of the insured, but in another respect it was broader than the stipulation under consideration, because it absolutely cut off the insurer's right to litigate the validity of the policy because of the untruth of the representation, no time being given to the insurer in which to contest upon the ground that the representations were untrue.

“A stipulation like the one under consideration ought to be an incentive for the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy is issued, while the matter is fresh.

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The witnesses are all alive and the exact truth can, if ever, be ascertained; and the stipulation prevents the insured from lying by and receiving the premiums during the life of the insured, and after his death, when the good faith and truth of his representations cannot be supported by his oath, contesting the policy upon the ground that the insured's representations were false or untrue. Such stipulation is neither unreasonable nor contrary to public policy.

"The stipulation in the application, that any fraudulent or untrue statements vitiate the policy, and the stipulation under consideration are not inconsistent. The stipulation in the application preserves the company's right to avoid the policy for fraud or untrue statements during the time limited."

The case was affirmed in the Court of Appeals and is reported in 118 N. Y., 237. In delivering the opinion of the Appellate Court, Mr. Judge Potter says: "The Court is asked to hold that the parties to the stipulation understood (for unless the insured so understood the stipulation the defendant was practising a *fraud upon him*) that while the stipulation embraced all representations that were untrue, it did not embrace the same stipulations if known by the party making them to be untrue. The practical difference or effect of this would be that, upon a trial to enforce the contract, the proofs of the representations, their materiality and untruth, would have to be made all the same, but the stipulation would come in as a defense to all representations save those the insured knew to be false.

"While I might, perhaps, entertain the idea that the

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insurer so understood the stipulation, I am very confident that the *insured* did not so understand it.

“It seems to me the analogy is based upon the entire misconception of the object and meaning of the stipulation. It is not a stipulation absolute to waive all defenses and to ‘condone fraud.’ On the contrary, it recognizes fraud and all other defenses, but it provides ample opportunity within which they may be, but beyond which they may not be established. It is in the nature of and serves a similar purpose as statutes of limitation and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law, and such an agreement is in accord with the policy of statutes of that character.

“No doubt the defendant held it out as an inducement to insurers by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years, and in the end, and after the payment of premiums, the death of the insured and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not and never had an existence except in name. While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud

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and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specified time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid."

With all due respect for the learned Court, I cannot concur in this decision. To quote the somewhat exuberant language of counsel in the brief filed in the case of the *Commercial Bank of Manchester vs. Bucker* (20 Howard U. S., 108): 'Fraud vitiates everything into which it enters. It is like the deadly and noxious simoon of arid and desert climes. It prostrates all before its contaminating touch and leaves only death and destruction in its train. No act, however solemn, no agreement, however sacred, can resist its all-destroying power.

"All acts into which fraud enters are nullities."

The doctrine thus grandiloquently expressed is sound, and it is well settled that "if a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or into whatever ramification it may extend. Not only is the person who committed the fraud precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself. In equity no length of time will elapse to protect and screen fraud. 'Those,' said Lord Cottenham in *Trevelyan vs. Charter* (4 L. J. Ch. N. S., 214), 'who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the

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enjoyment of their plunder; and their children's children will be compelled by this Court to restore it to those from whom it has been fraudulently abstracted"! The right of the party defrauded to have the transaction set aside is not affected by lapse of time, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed." (Kerr on Fraud and Mistake, page 51.) This being the rule of the Common Law, I am not satisfied, notwithstanding the decision of the Court of Appeals, that the insurer would be bound by a contract into which he had been misled by the fraudulent misrepresentations of the insured, especially when it is remembered that it is usually practically impossible for him to ascertain the real facts in the case during the lifetime of the insured. In this connection I may be pardoned in quoting, from an address delivered some years ago, sentiments which my later experience in examining these cases has not modified:

"The insurer of a life stands in a different position from one who insures a house; the latter may examine his risk carefully and thoroughly — he may ascertain its distance from neighboring buildings, the nature of the walls between it and them, the internal supports, the arrangement of the heating apparatus, the character of the roof, the probability of total or partial loss in case of fire, the efficiency of the department on which he must depend for the extinction of a conflagration, the nature of the business carried on in it and adjacent buildings, and every conceivable element which enters into the calculation of his risk. They are all existent patent to his investigation, and it is his own fault if he does

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not enter into his contract with a clear and perfect understanding of the risk which he assumes. With the insurer of life the case is very different. Certain elements of the calculation are, of course, within his reach. He can estimate properly the influence of the climate in which the proposed life dwells, the hazard of his occupation, the especial diseases to which his locality is exposed, and the average length of human life. From all these facts he can deduce a table of life which will enable him to rate exactly the cost of insuring the theoretical man. But when he comes to carry his theories into practice, he has in reality no means of ascertaining whether the life proposed reaches the average standard but the statements made to him by that proponent. Medical men know very well that there may be inherited, or even acquired, tendencies towards certain diseases which no physical examination will detect, and against which the insurer can be warned only by a true and accurate family and personal history. The tremendous influence over the question of life or death, which is wielded by such tendencies, by habit, by temperament, is an important factor in every calculation upon a single life, and cannot be properly estimated unless every circumstance and fact which the insurer desires to know is stated to him fully and accurately. I recall a case in which the applicant for insurance presented a clear, unquestionable record. One sister had died of yellow fever; it was true, but he omitted to add that, had the fever spared her, she would have died of consumption within six months. Another sister died of suppressed menses; it was also true, but he omitted to state that vicarious menstruation ensued

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from the lungs, and caused her speedy death. So with several members of his family, who, with well-developed phthisis, had actually died from other causes. The applicant himself was apparently sound, and physical exploration failed to discover any symptoms of disease, yet his death within a year from consumption showed that he must have had strong tendencies towards that disease, and investigation developed the facts I have detailed. As is usual in such cases, no ground of suspicion was presented until the death occurred. Then the very fact of such a death showed that misrepresentations must have been made and not until suspicion was thus aroused was such an investigation deemed desirable. It is practically impossible to verify at the outset every statement made by an applicant for life insurance, and as he knows, and from the nature of the case must know, the truth or falsity of what he alleges, it was only just that those claiming under him should be bound by his representations. If his death occur from a cause or under circumstances inconsistent with his statements the insurer is, for the first time, informed that those statements were false, and is justified, both in law and in good morals, in resisting a demand based upon a contract into which he was led by the misrepresentations of the contracting party upon whom he relied."

That deliberate, intentional fraud is a good defense to an action upon a policy, even in the absence of any express stipulations, is held in the case of *Smith vs. Insurance Company* (123 N. Y., 85). The facts are, as Judge Finch says in the opinion of the Court, unusual and extraordinary. "In answer to the plaintiff's demand for the sum payable by the

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defendant's policy of life insurance, the company took upon itself the difficult burden of proving that the insured perpetrated a deliberate fraud, planned upon a broad scale, and accomplished by taking his own life; that his efforts to achieve success failing, and a future of poverty and debt seeming to await him, he determined to secure a large insurance (\$282,000, in thirty-six different companies) upon his life, appropriate it to the payment of his creditors and the comfort and support of his relatives, and reach the result by suicide. The difficult burden was successfully borne, as the verdict of the jury has determined, and the sole inquiry now is whether the scope and range of the evidence admitted, showing the acts and declarations of the assured, transcended the lawful limit or violated the rules of evidence." After discussing the several exceptions to the evidence the learned Judge says: "These acts and declarations all occurred before the plaintiff took his policy as collateral, and when they affected no one but Tyler (the life insured) himself. They tended to show the origin and progress of the fraudulent intent, the manner of its growth and the motive from which it sprang. They indicate a sane and deliberate purpose moving steadily to its result, and constitute a part of the history of the fraud. They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life which he knew he could not continuously maintain. They show the motive of the fraud, and mark its progress and harmonize so completely with all which afterward occurred as to constitute, with that, elements of the single transaction, the fraudulent

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conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestæ* and did not transcend its limits.

“Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true, but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of the deliberately conceived purpose of fraud.”

In the case of Wright (*supra*) it was intimated that it was the duty of the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations in the application while the insured was living, and not, after receiving premiums for a series of years without question, raise the issue after his death. This is a view commonly taken, although, as I have shown, in most cases there is no reason to doubt the good faith of the applicant until death occurs. Judge Follett implies that the insurer may bring an action to annul the contract on the ground of fraudulent misrepresentations during the life of the insured, but this is not beyond question. It has been held in England (*Barker vs. Walters* 8 Beaver, 96) that when a policy is void by reason of any fraudulent misrepresentation the company is entitled to file a bill, to have it delivered up to be canceled, and that this is a right possessed in common with every person from whom any deed or other instrument has been obtained by fraud or misrepresentation, but in this country the weight of authority

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appears to be against this proposition. In *Insurance Company vs. Stanchfield*, U. S. Circuit Court for the District of Minnesota (2 Abbott, C. C., 1), before Justices Miller and Dillon, and in *Insurance Company vs. Bailey* (13 Wallace, 616) the loss had occurred before the bills were filed, and they were dismissed substantially on the ground that the insurers could set up the facts alleged as a defense in suits upon the policies, and that the cases were therefore amenable to the familiar rule that equity will not intervene where the remedy at law is perfect.

In *Insurance Company vs. Insurance Company* in the U. S. Circuit Court of Connecticut (17 Blatchford, 142) the suit was to cancel a policy that the company had already attempted to cancel, upon the ground that the insured had become so far intemperate as to impair his health, the policy stipulating that it should be void if this contingency happened. The owner of the contract refused to agree to the cancellation, but continued to tender the premiums. The bill was filed to definitely determine the rights of the parties. A demurrer was interposed to the bill and overruled. Two reasons were alleged why the Court should sustain the demurrer. The first was that, while a Court of Equity has power to cancel instruments which are void by reason of fraud in their inception, it has no jurisdiction to cancel instruments which have ceased to be binding since their execution; second, that while, at the instance of the insured, a Court of Equity may compel an insurance company to reinstate a canceled contract, equity will not interfere to enforce a forfeiture. In passing upon the demurrer Judge Shipman said: "Upon the

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first proposition it is true that a Court of Equity has not, or will not exercise, jurisdiction to cancel a contract merely because it has become void or inoperative by reason of some fact which has taken place since its execution. Such an exercise of power would give a Court of Equity concurrent jurisdiction with the courts of law over all contracts which one contracting party may allege to have been broken by the other. But, while relief from the consequences of fraud is peculiarly the province of a Court of Equity, it has not refused to cancel contracts which have been performed, or which have become inoperative, when the special circumstances of a case rendered it unjust or oppressive that the contract should be an outstanding claim against the plaintiff. The reasonable rule is that a Court of Equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where the special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party. Chancellor Kent was inclined to think in *Hamilton vs. Cummings* (1 Johnson's Ch., 517) that 'a Court of Equity had jurisdiction to set aside a bond or other instrument, whether the instrument was void for matter appearing on its face, or from the proofs,' and that these assumed distinctions were not well founded. He says: 'Perhaps all the cases may be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that the resort to equity, to be sustained, must be expedient,

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either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will depend upon the question of expediency, and not on a question of jurisdiction.' Second, it is true that Courts of Equity will not aid to enforce a forfeiture, or to divest an estate for breach of covenant or condition subsequent, unless, perhaps, under extraordinary circumstances. When an estate has been forfeited, or when a pecuniary penalty has been incurred, by reason of the happening of a condition subsequent, or of the breach of a covenant, there is usually an immediate remedy at law to regain possession of the estate or to recover the penalty. There being such a remedy, equity will not interfere. The great principle is that equity will not assist in the recovery of a penalty or forfeiture when the plaintiff may proceed at law to recover it. In this case there is no estate to be regained, there is no sum in damages to be recovered. The insured is still living, and a cancellation of the contract is the only result which is to be attained. The plaintiff has now no remedy at law, and unless it can resort to a Court of Equity it must wait and become a defendant at the future suit of the holder of the policy. When such a suit will be commenced is a matter of uncertainty. The rule is not applicable to the cancellation of a policy of insurance upon the life of a living person." The Court then reasons

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that the relief should be given because of its expediency and in order to be just to the other policy-holders; that the foundation of insurance is the law of average, and if the insured are permitted knowingly to indulge in practises that notoriously invite disease, the investment of other insured persons is jeopardized. The Court quotes the language of Justice Bradley, that “the assured parties are associates in a great scheme. The associated relation exists whether the company be a mutual one or not. Each is interested in the engagement of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business.’ The objection that the company has already exercised its option of declaring the forfeiture is disposed of by the answer that it is important to the company to know before the death of the assured whether it has made an error in this action or not; that neither party should be left in doubt during a series of years as to his or its pecuniary rights in the policy.” In a later case in the United States Circuit Court of North Carolina (*Insurance Company vs. Bear*, 26 Fed. Rep., 582) it was sought to cancel a policy upon the same ground — the intemperance of the assured, the latter being still living. The Court, citing *Insurance Company vs. Bailey* (*supra*), held that a Court of Equity would not set aside a policy of life insurance during the life of the assured on the ground that it had been rendered void by something not appearing on the face of the policy, and which could be proved by extrinsic evidence; that if such power existed, it was not a case for the ordinary exercise of the discretionary power of the Court of Equity to order a cancellation, because the assured, who is

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now intemperate, may reform and live out the ordinary expectation of life.

In view of these conflicting decisions, neither of them by a court of the highest authority, the question of the exercise of this equitable power must be regarded as still an open one.

A suit upon a life policy is an especially difficult one to defend, for several reasons. In the first place, there exists in this country a very general prejudice against corporations, which inclines a jury to view with favor any claim by an individual against one of them. Then the plaintiff is usually a widow or some other dependent of the deceased, and the contrast is strongly drawn by counsel *arguendo* between her poverty and the heaped-up millions of the defendant, the corresponding liabilities of the latter being carefully kept in the background. Another consideration which is entertained, but not put forward so prominently, is that a verdict for the plaintiff will take from the treasury of what is generally a distant company, chartered by another State, a sum of money which will be invested or expended by a neighbor of the jurors, to the benefit of the trade of their vicinage, and consequently of themselves. Another difficulty for the defense is that the most important evidence is often that of the attending physicians, and this is unattainable by reason of the statutes forbidding them to testify to any knowledge acquired through their professional attendance, as well as by reason of their own sense of the obligations of their professional honor. And to these considerations must be added another of a much higher character, that natural human

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instinct which leads us all to speak well, and to endeavor to think well, of the dead. The fall of the curtain upon a human life covers at the same time his faults and vices, and adds enormously to the difficulty of establishing to the satisfaction of a jury facts which are notorious, but which blacken his memory. The very neighbors who, during a man's life, denounce him as a worthless sot, will, when called as witnesses in a suit upon a policy on his life, reluctantly admit that he perhaps on rare occasions drank to excess, but not to an extent to impair his usefulness or affect his health. So when a suicide takes place the associates of the deceased at once begin to think that they had previously noticed symptoms of aberration of mind, quite sufficient to justify a strong suspicion of his sanity, although no such idea had ever occurred to them before the catastrophe.

The late Rufus Choate, one of the ablest and most experienced, as well as one of the most successful jury lawyers that this country has ever seen, was accustomed to say that God Almighty knew everything except what verdict a petit jury would render upon a given state of facts. The counsel for the defense in an insurance case knows only too well what verdict the jury is almost certain to render, if allowed to follow its own inclinations, and hence concludes that the proper time to contest a claim upon a policy is, if you will pardon the Hibernicism, before it is issued.

As you have doubtless discovered, I have stated to you only a few general principles and leading cases in the Law of Life Insurance, which is all I expected to do even if I had ventured to assume that I could have given a more complete

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abstract of it. But, as Chief Justice Abbott wisely remarked, in summing up the case of *Montrie vs. Jeffreys* (2 Carrington & Payne, 116), "No attorney is bound to know all the law — God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law." The volumes of text-books and reports have multiplied enormously since his time, and there is still less ground for such an imagination at present. But I have, I hope, said enough to interest you in the subject, and to indicate the lines of study to be pursued. Life Insurance Law is practically the growth of the last twenty years, for only within that time has the spread of Life Insurance been so great as to require much consideration from the courts, and many important questions are still undetermined, while many more are certain to arise and demand judicial decision.

The tendency of the age is towards specialism. In both law and medicine this tendency is especially marked, and if, as I presume will be the case with most, if not all, of you, you enter upon the practise of your profession in any of the great centres of wealth and population, you will find it necessary, in order to be successful, to devote most of your attention and study to some particular branch of the law. In making the selection of the object of your life's devotion, I trust that these lectures may have their weight in inducing some of you to turn your minds towards the Law of Life Insurance. In that trust I commit the subject to your consideration.

SPEECH AT BOSTON, MASS.

AT THE DINNER OF THE AGENTS OF THE MUTUAL
LIFE INSURANCE COMPANY OF NEW YORK
AT BOSTON, MASS., ON JANUARY

25TH, 1893



SPEECH AT BOSTON, MASS.

IT gives me great pleasure to appear before you this evening, and I congratulate myself that this meeting takes place at a season of the year when all the executive officers are busily engaged in studying the results already accomplished, and making preparations for the future, so that they were obliged to delegate to me the very agreeable duty of representing the Company on this occasion. And it is particularly agreeable to me that my first appearance in that capacity should be made here. Massachusetts has always been one of the foremost States of the Union, her sons have been prominent and successful in every walk of life, and the work which has been done on behalf of the Mutual Life by the gentlemen assembled shows that their energy and ability is what is to be expected from the sons of the old Commonwealth. And if I may be allowed to refer to personal matters, both my mother and my wife were born in Boston, so the city and State are very dear to me. As a small boy, I used to accompany my mother on her annual Thanksgiving visits to her father's house, on the corner of Sumner and Arch Streets, then a fashionable residence quarter, and the change in the city since that time is marvelous indeed. There were then no Public Gardens, the water in the Back Bay

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still flowed to and fro unhampered, and the stately residences of Commonwealth Avenue and Beacon Street, and the great warehouses and roomy stores which adorn the business sections, were not even dreamt of in the distant future. The increase of population, of wealth, of business, of resources of every character, has been enormous, and you may congratulate yourselves on having a field of action so capable of yielding abundant fruit.

This occasion is one of especial interest in view of the fact that the Company has nearly completed the first fifty years of its existence. To recite its growth from the receipt of the first premium to the magnificent accumulation of assets which we see to-day would be but to repeat an oft-told tale, doubtless as familiar to you as it is to me; but the fact that the growth has been so great shows us that there is no conceivable limit to what may be attained in the future. No man can undertake to say when its usefulness shall cease, or how the broad wide-spreading stream of its beneficence can ever be stayed. Yet at this time it is becoming that we should rejoice over the past and make plans for the future. Since its first establishment in the early days of Jewish history, the year of Jubilee has been one of balancing accounts, of estimating results, and of rejoicing over what has been done. Church and State alike from time to time have celebrated such occasions with every manifestation of joy, and with all the pride and pomp which circumstances permitted. Surely it is fitting that a great institution which has benefited so many thousands of families, which has provided food for the widow, and education for the children, in many cases

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sorely needed, which has encouraged thrift and prudence, and enabled the man of small means to obtain the advantage of the most favorable investments under the guidance and advice of the most experienced and successful financial and business men, which to-day holds in its hands the future of so many thousands of individuals, and does so with the assurance of absolute safety and reliability — such an institution may well celebrate its Jubilee and call upon the world to celebrate with it. We honor also in this year the memory of Christopher Columbus, and it is right that *we* should do so, for if he had failed to discover America, the Mutual Life might have been established elsewhere, but among all the grand results of that discovery, and the great institutions which have been developed on the American Continent, there is none which, considering its feeble beginning, and its sturdy age, deserves more of our admiration and respect than the grand old Company which we serve and love.

You, gentlemen, are practically the army advancing into the enemies' country, or perhaps I should more properly say, the reapers going forth to gather the harvest, while we at the home office furnish the tools and the supplies which are needed to keep you in the field and to enable you to do the work. You are all doubtless kept well advised by the efficient General-Agent of this District, the courteous gentleman and genial good fellow who is our host to-night, how actively and thoroughly the Home Office performs its part, and how constant is the effort to furnish every incentive and every needed supply to the men at the front. My own close personal relations with the officers may perhaps make my

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praise of them seem a matter of course, but I cannot allow this opportunity to pass without expressing my admiration and affection for the President of the Company, and for the clear, keen intellect, the untiring industry, the dauntless energy and the warm heart which Mr. McCurdy brings to the discharge of his duties, and to which is due the marvelous increase of the Company's business during the last eight years.

Among the tools with which you have been supplied are two new forms of policies, the so-called five per cent debenture, and the continuous instalment, both of them novelties of high promise which should aid materially to make the business of this semi-centennial year enormous in amount. I assume that you have all read the circulars which have been issued in regard to these new plans, and are familiar with their general characteristics, so that it is not necessary for me to discuss them in minute detail. But the important point to be observed in the debenture policy is, that it is in effect a five per cent bond for twenty years, that is, the beneficiary of such a policy, upon the death of the insured, holds a bond which is as reliable and as certain of payment as that of any Government, State, Municipality, or Corporation in the wide world which has twenty years to run at what is now the high rate of interest of five per cent per annum, and is payable at par at the end of that time. The advantage to the insured is that should he survive the distribution period the application of the surplus then credited to him to the purchase of an annuity would go far to reduce, if not altogether extinguish, future payments on the policy. And there is another of much greater importance. With my long ex-

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perience in the Company's service, and my knowledge of the embarrassment often caused by the death of beneficiaries, the necessity of going to the expense of appointing administrators or guardians, or of probating wills, in order to transfer an interest, I can thoroughly appreciate the immense saving and convenience caused by making the interest of the nominee contingent on his surviving the nominator. The latter may have selected, for example, his wife as his first choice, as most good husbands, and it is to be hoped all Massachusetts husbands, would do, and in the event of her death during his lifetime, instead of probating her will or administering on her estate, he has only to file with the Company an affidavit of the fact, and nominate another person to receive the benefit of his forethought. Again death may defeat his intention, and again he has only to file his affidavit and his nomination. The simplicity of this method, its avoidance of the annoyance of asking for releases from next of kin, and of any expense or trouble whatever, is a point which should commend it strongly to the insuring public. In brief, it enables a man to provide with absolute certainty for the future of any one dependent on him, and yet empowers him to transfer the fund to another when his bounty is no longer needed by the one for whom it was intended. At the same time these policies will be assignable or available as collateral security. I have no doubt that the interest of the nominee would be held to be of such a character that he could not be deprived of it without his own consent, but that an assignment by nominator and nominee together would be valid is to my mind beyond question.

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The continuous instalment policy possesses advantages of another character. Many a prudent man hesitates about insuring his life, because he is not at all sure that his wife or children would be able to use to advantage any large sum of money coming to her or them at his decease, and fears that through their incapacity or the possible frauds or defalcations of executors or trustees the result of his thrift and economy may be dissipated or lost by unwise investment. The old form of policy payable in instalments did not altogether relieve this apprehension, for under it the beneficiary would receive payment for a certain number of years and then the income would cease, at a time when habits had been formed and a mode of life become customary, based upon regular receipts. But by the plan now in question these instalments are continued throughout the life of the beneficiary, and the dying husband who has made this provision for his wife has the satisfaction of knowing that should she survive him for forty or any number of years, she has an assured income for all that time. I use the word assured deliberately, for it is not so many years since the failure of a railroad which had been a favorite investment with Massachusetts merchants involved so many estates and so many families in serious embarrassment. Here you have to offer to your customers a security which is absolute — in which there is no possibility of a shrinkage of value, or of the passing of a dividend, which will be always at par, if not at a premium, and on which the payments will be made as they become due with the regularity of the sweep of the solar system around the sun. These policies are also assignable during the life of the insured

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with his consent, but it is contemplated that the instalments shall be, and may be made, absolutely inalienable by the beneficiaries.

I have not thought it necessary to refer to the numerous advantages which The Mutual Life offers over all its competitors, and to the many other kinds of policies designed to meet every taste and fancy, and every desirable method of insurance and investment. In the language of the late Judge Kent, when a young counsel commenced his argument with an historical sketch of the origin and growth of the Common Law, "The Court must be presumed to know something," and I do not venture to undertake to instruct you gentlemen in subjects on which you are doubtless far better informed than myself. But as the two forms of policies I have mentioned are entirely new, I have called your attention to what seem to be their special features.

These are the tools which we have forged and prepared, and which we expect you to use to the mutual benefit of the Company, of the insured and their families, and of yourselves.

And in speaking of the business to be done, it seems to me proper to refer to the question recently mooted as to the propriety of limiting the transactions of great corporations. There is undoubtedly a growing feeling among the people that some bounds must be set to the growth of corporate capital in the near future, and some restrictions placed upon the amount of their accumulations. One remedy has been proposed by that distinguished actuary, Mr. D. P. Fackler, who advises that the assets of any one company be limited

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by law to two hundred millions of dollars, and that any company which has accumulated that amount shall be prohibited from writing any new policies. This, with all respect to the high authority by whom it was promulgated, seems to me crude and unsatisfactory if we consider the necessary consequence of such action. The company which had reached this point would cease to do new business, yet its assets would continue in the nature of things to increase for years, then through an enlarged death rate and the absence of new life slowly to diminish, until the company were at length at liberty to endeavor to replenish its emptying coffers. But by that time, a species of dry-rot would have set in; the officers, accustomed only to the business of a trust company or a bank, would have forgotten how to appeal to the insuring public, the agency system would have fallen into "innocuous desuetude," to quote a phrase not long ago famous, and would have to be reconstructed at a large expense. On the other hand, the proposal to limit the insurance which any one company can write to, say one thousand millions, is open to no reasonable objection. This was first proposed by Mr. Beers while President of the New York Life Insurance Company, and the only criticism I have seen upon it is the caustic remark that he in effect wanted somebody to hold him to prevent him from going too far in his rivalry with other companies. But this does not seem to me quite fair. What he really wanted was that somebody should hold the other fellow and prevent him from getting too far ahead. Such a limitation upon the amount of business would at once put an end to the present unseemly strife about agents, commissions,

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and rebates, which has been and is such an injury to the business of life insurance generally and to the great competing companies especially, for they, knowing that the end was near at hand, would have no object in hastening its approach. But the limitation of the amount of assets would make it to the interest of each to attain that limit at the earliest possible moment from premiums on new policies which would continue in the future, and so tend to strengthen to an unbearable degree, for some years to come, the present competition. This we at least are anxious to avoid, and will willingly accept the proposed limitation of insurance in force to one thousand millions of dollars.

Nor need you fear that such action would seriously restrict your labors. To keep that amount in force upon our books, to replace the deaths, the surrenders and the lapses, we should have to write every year from sixty to seventy millions of new business, to say nothing of the amount yet to be written before we reach the limit. So you will still be required to use every effort to increase your transactions and to make this semi-centennial year memorable in the history of the Company for the work you do.

And so, speaking for the President and in his name, I urge you on to your work, and wish you God-speed.

The Alpine climber in the Bernese Oberland sees before him a towering mountain summit which seems to kiss the heavens and be enveloped in the clouds. Yet when after long and painful effort he has reached his point, it is only to find another peak rising still higher, and calling upon him for fresh exertion. So your efforts can never cease. The fact

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that through your aid the Company wrote so many millions of insurance last year means that this year we intend to write much more, and the amount of achievement is only the standard by which to measure the expected achievement of the future. The law of life, the law of nature, requires constant progress or regress. No human being and no human institution can stand still,—it must either advance or retreat, and for us only advance is possible or conceivable. It remains for you and for me, and especially for you, so to bear our part in the great work which we have undertaken that when our Centennial year shall dawn, what seems to us the lusty manhood may appear by comparison to the then representatives of the Grand Old Company only the feeble childhood of the infant, puny indeed but of vast potentiality, born fifty years ago.



SPEECH AT SAVANNAH, GA.

MADE AT A DINNER GIVEN BY THE BOARD OF
TRADE OF SAVANNAH, FEBRUARY 8TH, 1893.



“THE UNITED STATES”

I PRESUME it is expected, or if it is not expected, it is certainly most natural, that any stranger speaking in your city on any subject should preface his remarks by the expression of his admiration for the city itself. Its broad streets and beautiful squares, its parks and drives, first impressed themselves most pleasantly upon me in a brief visit which I made here about eleven years ago, and the charming recollections of Savannah which I entertained have been greatly enhanced by the observations now made, and by the courteous hospitality which I have enjoyed. The growth of the city in the interval to which I have referred is obviously very great, and I congratulate you that the increase of business, of wealth and resources of every character, is of corresponding magnitude and argues so strongly for a prosperous future. I have not thought it necessary to quote from gazetteers and encyclopedias statistics with which you are doubtless familiar, to prove to you how great you are; but the advance that has been already made since De Soto wandered through the mountains of Georgia, or since, in comparatively recent times, Oglethorpe founded his little colony here, is the best earnest of what may be expected in the future. I need scarcely add how much I feel honored by the invitation to

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attend this dinner, and how much gratification it affords me to be present.

I am asked to respond to the toast of "The United States," and feel somewhat appalled at the magnitude of the task set before me, as one to which little justice can be done in the brief time which can be given to an after-dinner speech. Thank God that they are now in fact and in truth the United States, and that the differences which once tended to sever them have vanished forever. It is a somewhat curious coincidence that some days ago, and before I had even heard of this dinner, I was so struck by an article in the *Atlanta Constitution* of December 23d, bearing upon this point, that I cut it out for my scrap-book. It was in reference to the rosy dreams entertained at intervals by our British cousins, that the bonds issued by the late Confederacy will some day be paid, and in the hope that it is not familiar to you I venture to quote a portion of it. "It is purely visionary,—this expectation that any of the Confederate bonds will ever be redeemed. The federal government will not redeem them; the Confederacy's ghost is not able to attend to business, and the new South is forced by circumstances over which she has no control to draw the line between sentiment and taxes. The Confederates had to accept the fortune of war, and their friends who aided and abetted them will have to do likewise.

"The holders of Confederate bonds in England are rich men with a speculative bias. If they desire to make money out of the South they can easily do it in the right way. They will find opportunities for investments here that will yield

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them surer, larger, and quicker returns than they can reap anywhere else. Let them withdraw their capital from the South American countries, where it is always endangered by revolutionary upheavals, and invest it in the rising industries of the South. If they will do this they will bless their Confederate bonds and frame them for their heirs with the statement that these souvenirs of a lost cause drew them to this favored region where they multiplied their millions. There is no money to be made out of the late Confederacy, but there is plenty of it to be made out of the States that composed it — not by digging up ancient history, but by judicious investments in what is destined to be the richest section of the Union.”

This view of the situation is unquestionably correct, and it is hoped that the advice will be accepted in the kindly spirit in which it is given.

I would that I had the silver tongue of your eloquent and lamented Grady to do justice to this subject. New York has not yet forgotten the thrill of enthusiasm aroused by the message which he brought from the new South and is only too glad to work heart and hand with her in developing the prosperity of the entire country. The old fable of *Æsop* has not ceased to have force and meaning for later generations. Hearts, hands, digestion, and brains must all work together in harmony to accomplish any result.

And the elements at our hands for use are incalculable. Statisticians estimate that the agricultural products of this country can feed one thousand millions of people. The Comstock lode alone in 1877 produced over thirty-seven

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millions of dollars; twelve little holes in the side of a mountain yielded more wealth that year than three million eight hundred and ninety thousand acres planted to corn. In coal, in natural deposits of every character, we have the advantage of the known world, and as our population grows, as it will grow, sufficiently large to make proper use of them, Mr. Gladstone's prophecy will be fulfilled when he said, referring to this country, that "She will probably become what we are now, the head servant in the great household of the world, the employer of all the employed, because her service will be the most and the ablest." It has been well written, "If it is not unreasonable to believe that our agricultural resources alone, when fully developed, are capable of feeding one thousand million, then surely, with our agricultural and mining and manufacturing industries all fully developed, the United States can sustain and enrich such a population. Truly has Matthew Arnold said, 'America holds the future!'"

I had the fortune to pick up in England last summer a book entitled, "Uncle Sam at Home," a very laudatory and appreciative description of this country, written by a visitor to us. He sees clearly our many natural advantages and gives many reasons for our growth, and among them one which is so consonant with our own views that I venture to quote it: "Commerce is the simple exchange of commodities, and so long as these get into the hands of the consumer it matters little whether they come from Tartary, Timbuctoo, or Maine. It is rather the quantity and quality of an article, and not the place of its growth and manufacture, that most

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concern the person using it ; and that American consumers have quantity is shown by the fact that the internal commerce of the United States divided among the population averages seven tons per head, against six tons in Britain, although a greater proportion of the latter is for export. The merchandise sent from New York to San Francisco is, so far as distance can make it, foreign, as foreign as that sent from Liverpool to Philadelphia, and exchanges between Baltimore and Chicago have as foreign a character as those between London and Genoa. America presents, indeed, the greatest example of free trade the world has ever seen. It is also the most beneficent, for without this free trade there could be no union."

Happily all this is now thoroughly understood in all sections of our great country, and the result of this understanding is to grapple all together with hooks of steel. We shall have this year at Chicago, in the Columbian Exposition, the greatest exhibit which the world has ever seen, of art, science, literature, mechanics, material development and prosperity of every character, and yet we stand but upon the threshold of what is possible to us. With the reform administration now coming into office, and the expected relief from the onerous taxation of the present tariff, we may confidently anticipate a future which will not only far surpass all realized actualities, but even the wildest dreams of the most vivid imagination.

In speaking of the United States, I must be pardoned for referring to what is to me the greatest institution developed in them, The Mutual Life Insurance Company of New York,

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to my connection with which I am indebted for the honor and pleasure of being with you this evening. It is an institution now not only of the United States, but of the world, and is a wonderful illustration of the possibilities of our day and generation. Commencing business fifty years ago, upon the purely mutual plan, without any capital, and without any resources but the premiums paid in by its policy holders, it is to-day of such magnitude that "should it expand no further, and simply carry out the contracts it has already made until the last dollar of its magnificent accumulation is paid to the family of the last survivor, it must still continue in the generation to come the vastest pecuniary trust which the world has ever known. It will administer more of the wealth of the world than the richest empire of the East ever controlled, and will pay out year by year a larger sum than the government of the United States collected for its entire revenue within the memory of men now living."

I am not touting for policies on this occasion, and I assume that every member of this Board has sufficient business caution to induce him to carry all the life insurance he can get; so you need not be apprehensive that I shall urge you to take out applications. What the people of Georgia think of us is shown by the fact that they insured their lives in our Company during the last year alone for over \$4,000,000. What we think of the people of Georgia is shown by the other fact that when we closed our books on the 31st of December last we held among our investments securities of the State, and of various municipal, railroad, and other corporations of Georgia for more than \$4,000,000, and that we rely

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upon the payment of every dollar of that indebtedness with the same undoubting confidence which is entertained by every honest holder of a policy in our Company. And we take a pardonable pride in the fact that we were the first to recognize the potentialities of the new South, and that we subscribed for an entire issue of bonds of the State of Georgia at a time when others hung back and felt no confidence in her future. Nor are we discouraged by any temporary embarrassment of a solvent corporation. In the nature of things we wish for the prosperity of every community in which we are interested, for in the fullest sense of the words we are a mutual company — their prosperity is our prosperity, and their loss is our loss. We must endeavor to conserve rather than destroy, since to destroy values is to injure ourselves. Further, from the nature of our business we can never be compelled to realize upon our assets; we can always give any needed time for recuperation; so our will, our interest, and our ability combine to induce us to aid the weak rather than to oppress them.

The old Mutual Life, now celebrating its jubilee, looking backward proudly over fifty years of unexampled progress and development, looking forward confidently to still greater growth in the future, sends by me its greeting to the Board of Trade of Savannah, and to the fair city here represented, and wishes for both similar prosperity and success.

ADDRESS TO BOSTON LIFE UNDER- WRITERS

DELIVERED AT THE DINNER OF THE BOSTON LIFE
UNDERWRITERS' ASSOCIATION ON
FEBRUARY 14TH, 1893.

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ADDRESS TO BOSTON LIFE UNDER- WRITERS

IT gives me great pleasure, gentlemen, to be with you this evening, and to be with you as the representative of one of the greatest institutions of the world. I presume it cannot be necessary at this time and before this assembly to exploit the history and the position of the Mutual Life. I presume that most of you, in a business way, have had occasion to study her methods and her figures, in order to prove to possible customers the vast superiority of the companies in which you are respectively interested over the pioneer in the business. But I should not attempt now to refute your arguments or to question your assertions. To paraphrase the language of Webster: "I shall enter upon no encomium upon the Mutual Life. She needs none. There she stands. Behold her and judge for yourselves. There is her history; the world has it by heart. The past, at least, is secure." In the fifty years which have elapsed since her organization she has become the greatest financial organization in the world. She has developed the principles of life insurance until what was a misty chaos of doubt and uncertainty has become a coherent system of scientific laws, and she feels now that even her most strenuous and her most active rivals in business

ADDRESS TO BOSTON LIFE UNDERWRITERS

sympathize with her and congratulate her as she celebrates her jubilee.

Yet to have lived for fifty years is no great achievement, either for a man or for a corporation, unless that life has been of some benefit to humanity. A selfish, narrow existence, which serves only the individual and adds no appreciable force to the great movement of the world, is a wasted existence, valueless and unprofitable. Not such has been the career of the Mutual Life and of the other life insurance companies which in these latter days have added so much to the comforts of life, by enabling the husband and father under all circumstances to provide for the future of those whom sooner or later he must leave behind him to enter on the conflict with the world in their own behalf. How many deathbeds this phase of modern civilization has made easy, how many widows it has helped to comfort, how many children it has saved from poverty and vice, is known only to the Omniscient. But every worker in the field can recall instances in his own experience which satisfy him, at least, how much good has been accomplished.

So I think that those of us who are engaged in disseminating and inculcating the principles of life insurance, and in doing the work of the companies, whether with the army in the field or with the executive and staff departments at the Home Office, deserve well of our day and generation. From time to time the old idea of a more primitive era crops up, that all middle men or non-producers, of every class and variety, are mere vampires of society and mere drags upon its progress. We cannot all be hewers of wood and drawers

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of water, and a slight acquaintance with the principles of political economy teaches us that the savings of the farmer, of the professional man, of the clerk, of every one who is not engaged in business which needs the use of his own capital, would be of little value if there were not others to save and invest for him what can be saved for the exigencies of the future from the necessities of the present. It is as unjust as it is ungenerous to say that the energies and toils which have been devoted to providing for the prudent and cautious a competence for their old age, or for their dependents, are wasted and unproductive. I think that all of us so engaged and having so passed our lives, as we near the end and look back, can do so with the well-earned satisfaction of those who, in helping themselves, have done so much to help others.

It may not be out of place on this occasion to refer to a discussion recently going on as to the propriety of limiting the transactions of great corporations. There is undoubtedly a growing feeling in the minds of the people that some limit should be placed upon the growth of corporate capital, some limitation placed upon its increase. How far that feeling may be justified by facts I do not care to discuss. But it undoubtedly exists and it must be heeded. One suggestion has been made by the eminent actuary, Mr. D. P. Fackler, the president of the Actuarial Society of America, who advises that the assets of any one company be limited by law to the amount of two hundred millions of dollars, and that any company which has accumulated that amount shall be prohibited from doing any new business until they sink below that sum. With all respect for the eminent authority

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by which it is promulgated, I think that it is somewhat crude and unsatisfactory, in view of the consequences of such action. When the company had reached this point it would be prohibited from doing new business. But in the nature of things its assets would continue to grow for many years, until finally, through the operation of an enlarged death rate and the absence of new life, they would slowly sink, until the company was again at liberty to endeavor to replenish its emptying coffers. But by that time a species of dry rot would have set in. The officers, used only to the business of the bank and trust company, would have forgotten how to appeal to the insuring public. The agency system would have fallen to pieces and would have to be re-established at large expense.

On the other hand, the proposition to limit the business in force on the books of any one company to the sum of one thousand millions of dollars, as proposed by a bill lately introduced into the legislature of the State of Connecticut, appears to be open to no reasonable objection. Such a limitation would at once put an end to the present unseemly strife about agents, commissions, and rebates, which has been and which is such a serious injury to the business generally and to the great competing companies especially. For each company, seeing the end in view, would have no special object in hastening its approach. And this limitation would still leave a large scope for the labors of the agents and for work to be done. For to maintain that amount of insurance in force, and to replace the losses from deaths and surrenders and lapses, would require a new business of from sixty to

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seventy millions every year. On the other hand, the limitation upon the amount of assets would make it to the interest of each company to attain that point at the earliest possible moment from premiums on new policies, which would continue to swell the assets in the future, and so tend to strengthen to an unbearable degree the competition now existing. This we, at least, are anxious to avoid, and are willing to accept the proposed limitation of business in force as one thousand millions of dollars.

I need scarcely, and yet it is but courteous to say, how greatly honored I have felt by the invitation to attend this dinner, and how much pleasure it has given me to be present. The rivalries and contests of business may sometimes tend to embitter our feeling toward each other, and it is good on such occasions as this to meet together on a common ground and to recognize the great underlying fact that we are all, each in our own way, working for a common object, that we are all striving for the spread of the great modern system of life insurance, and through it for the protection of the homes and the families of our country.



SPEECH AT WILMINGTON, DEL.

AT A DINNER OF THE AGENTS OF THE MUTUAL
LIFE INSURANCE COMPANY OF NEW YORK,

MAY 26, 1893



SPEECH AT WILMINGTON, DEL.

IT gives me great pleasure, gentlemen, to have the honor of speaking on such an occasion as this in this ancient city, founded but thirty-one years after the settlement of Jamestown, and about eighteen years after the landing of the Pilgrims on Plymouth Rock. It goes back to what is for this country a very respectable antiquity, and the old Swedish Church which still stands in your midst must be accounted among our very oldest buildings. Yet not for antiquity alone is this city or this State to be honored and esteemed, but for patriotic services rendered by its citizens during the War of the Revolution, and for the industry and enterprise which characterize this city to-day.

I appear as a representative of an institution very far junior in years, and yet not unlike the city of Wilmington in its marvelous and successful growth. We are now celebrating the Jubilee Year of our history, and in the fifty years of our existence not only have we accumulated the enormous amount of assets which we now hold, but we have been pioneers in the great system of life insurance, which has become one of the great institutions of our country and age. When we commenced business, the principles upon which it should be founded were but vaguely understood, the

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importance of a reserve was not duly estimated, the risks to be assumed were largely matter of guess work, and the premiums to be charged were equally uncertain. It is largely owing to the studies and experiments of this company, that what was then misty and indefinite has become definite and certain, and that the elements upon which the calculations of to-day are based are as absolutely correct as are the foundations of any other science.

I suppose it is hardly possible to make an after-dinner speech without repeating a story, and I venture to tell you one which I heard last winter, and which being entirely new to me is, I hope, equally so to you. It was the experience of a good brother living in one of the suburbs of Boston, who had undertaken to entertain over Sunday a clergyman who was visting the place to supply a vacant pulpit for the day. As the narrator says, when the parson arrived late on Saturday night he seemed pretty glum and pretty quiet, and we didn't say much to each other, and we didn't say much when we met at breakfast next morning. As we walked to church he was so sour and so glum and so quiet that I hadn't the heart to speak; and then he got up and preached us a most dismal and depressing sermon about man as a miserable worm, crawling in the dust and expecting every moment to encounter the just wrath of an offended Creator, and by the time he got through, and we started home, I was about as dismal and low down in my mind as I could be; and it occurred to me that he looked like a prohibitionist, and I was in the habit of drinking a bottle of champagne for my dinner on every Sunday, and I thought perhaps I had better omit it

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on that day, and then I thought I wouldn't; and when we came in to dinner, I said, "Parson, I have an old uncle up in Vermont who every fall sends me down a barrel of cider, and I have a bottle of it for my dinner every Sunday through the winter, and I would like to have you try it." The parson said he was pretty strict, but he was willing to take cider, and he took a glass and said it was the best cider he ever drank; and then he took another glass, and then he took a third; and when we went back to church in the afternoon, he held up his head and he pranced up the middle aisle and up into the pulpit like a coupé horse; and he preached us a rousing sermon on the text, "And God created man in his own image." The two states of mind are widely different, and I can imagine the first to have been that which was entertained by the first president of the Mutual Life, when he endeavored to discount the Company's note to raise funds to pay the first loss by death, and was obliged by his bank to obtain the personal indorsement of some of his trustees, and the other that of the present able chief executive, one of whose great anxieties is to invest in safe and profitable securities the millions of dollars constantly rolling in upon him from every section of the civilized world.

But there are other gentlemen present brimming over with eloquence which they are anxious to outpour upon this audience, and I do not feel justified in taking more of your time for the Mutual Life. Let me only add how thoroughly I have enjoyed this my first visit to your State, and how earnestly I hope that some similar occasion may soon call me here again.



LIFE INSURANCE IN ITS RELATION TO LEGAL MEDICINE

A PAPER READ BEFORE THE WORLD'S CONGRESS
AUXILIARY OF THE WORLD'S COLUMBIAN EXPO-
SITION, DEPARTMENT OF COMMERCE AND
FINANCE — LIFE INSURANCE CONGRESS
AT CHICAGO, ILL.. JUNE 21, 1893.



LIFE INSURANCE IN ITS RELATION TO LEGAL MEDICINE

IN treating the subject allotted to me, it seems not improper as a preliminary to consider the relations which the two professions whose united efforts produce the science of Legal Medicine bear to Life Insurance. It is a truism to remark that the whole fabric depends upon the fidelity, the learning, and the skill of medical men. When a company is formed, the lawyer may carefully draw its charter and its by-laws and formulate the contracts upon which it is willing to enter; the actuary may accurately estimate the risks to be encountered, the rate of interest to be expected, and the loading necessary to cover expenses; the executive may organize with skill and economy the working force and the agents in the field, but unless the medical examiner does his duty in barring out undesirable risks and accepting only those who may reasonably be expected to live out their theoretical expectation of life, the company is predestined to loss and ruin. He stands as a sentinel at the gate to prevent the ingress of those who would only destroy the structure, and upon his vigilance and care depend its continued existence. Any lapse from the strict performance of duty, any concealment of facts which the company should know in order to properly estimate the

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risk to be assumed, any approval of doubtful lives from motives of personal friendship or unwillingness to incur local enmities, is to admit a traitor to make a breach in the growing edifice which may easily result in its total downfall. I speak from my long experience in the service of The Mutual Life Insurance Company of New York, when I say that no language can be too strong to express my sense of the faithful and careful work by the medical examiner. Nor would I belittle the importance of my own profession in this great field of modern enterprise. Not only are the services of the lawyer necessary in the first inception of the company to prepare the charter and rules of government, the forms of policies, the agreements with agents and all the contracts with various individuals necessary to set the machine in active operation, but in supervising its investments, in declaring in what securities its funds may, and in what they may not, be invested, in examining the countless questions as to insurable interest, the form of policy, the next of kin of a deceased beneficiary, the rights of adverse claimants, the validity of assignments, to say nothing of the payment of legitimate claims to the persons entitled to the money, and in examining claims which may be doubtful and even fraudulent, his aid is indispensable. Not only in this branch of business but in many others are the relations of the two professions so closely connected that when Prof. John J. Elwell, in 1859, published his "Medico-Legal Treatise on Malpractice and Medical Evidence comprising the Elements of Medical Jurisprudence," he wisely chose as the motto of his work the remark of David Paul Brown, Esq., in his day a

RELATION TO LEGAL MEDICINE

distinguished member of the Philadelphia Bar, "a doctor who knows nothing of law and a lawyer who knows nothing of medicine, are deficient in essential requisites of their professions." But it would be difficult to find any form of commercial transactions more directly and absolutely dependent upon those two professions than the great business of Life Insurance.

In the discussion of any subject it is well to begin with clear definitions as the only preventative of misunderstanding and error. I think I may safely assume that all in this audience are sufficiently familiar with Life Insurance to comprehend me when I say that I mean the system as practised and carried into effect by the great companies of this country. The term Legal Medicine, or, as it has been also called, Medical Jurisprudence or Forensic or State Medicine, has been defined by many writers, but the most satisfactory definition to my mind is that given by Dr. Alfred Swaine Taylor, in his great work on the subject. He says it is "that science which teaches the application of every branch of medical knowledge to the purposes of the law; hence its limits are, on the one hand, the requirements of the law, and on the other the whole range of medicine. Anatomy, physiology, medicine, surgery, chemistry, physics, and botany lend their aid as necessity arises; and in some cases all these branches of science are required to enable a court of law to arrive at a proper conclusion on a contested question affecting life or property."

Assuming that the medical examiner has performed his duty fully in the first instance, that the application is satis-

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factory on its face, and that a policy has been issued, the questions which are likely to arise in which legal medicine must be called in to assist the company may be broadly divided into three groups as follows:

1st. — Questions arising under misrepresentations or false statements made in the original application.

2d. — Subsequent violation of his obligation by the insured, such as gross intemperance, or transgression of the restrictions imposed on residence or occupation.

3d. — Death in violation of the contract as by suicide, or a fraudulent attempt to prove the death of the insured while still living.

Misrepresentations or false statements in the original application when important refer either to the physical condition or to the habits of the applicant. If the medical man who is called as a witness on the trial has been the attending physician of the insured, he is in many States barred from testifying as to the disease or diseases of his patient by the statutes forbidding a physician to testify concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient, or do any act for him as a surgeon. In the case of *Gartside vs. Insurance Company*, reported in 76 Missouri, page 446, an attempt was made to draw the distinction that the statute forbids the physician to disclose only such information as has been communicated to him orally by his patient. But the Court very properly said: "It is doubtless true that a physician learns more of the condition of a patient

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from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source on which he must rely, viz., his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the legislature, and virtually to overthrow it."

I have cited this case in preference to many others on the same subject, because the reporter has attached to it a footnote giving the names of the States and Territories (twenty in all) which have enacted similar statutes, and the date of each, from that adopted in New York in 1828, to that in the Territory of Washington in 1882.

Yet the attending physician may often give testimony of the utmost importance, notwithstanding this limitation. Among the questions upon truthful answers to which depends the validity of a policy is usually one, "When did you last consult a physician?" or, "When were you last attended by a physician?" and if the evidence of the medical attendant shows that this was falsely answered, his testimony would be fatal to the plaintiff, since the fact of such attendance would be the point at issue, and the disease for which the attendance was required would be immaterial.

Other misrepresentations or false statements in the application usually refer to some personal illness or injury.

What is a serious illness or injury must depend upon the circumstances of each particular case. The insurance com-

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panies at the present day are disposed to deal liberally with their policy-holders, to take no advantage of technical points, and to contest a claim only when thoroughly satisfied that their duty to their honest constituents compels them to do so. This point was well considered by Mr. Justice Earl in the case of *Cushman vs. Insurance Co.* (70 New York, p. 72), when the applicant had answered in the negative the question whether he had ever had congestion of the liver. The learned Judge says, "In construing contracts words must have the sense in which the parties used them, and to understand them as the parties understood them, the nature of the contract, the objects to be attained and all the circumstances must be considered. By the questions inserted in the application the defendant was seeking for information bearing upon the risk which it was to take — the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders, or functional disturbances, having no bearing upon the general health or continuance of life. Colds are generally accompanied with more or less congestion of the lungs, and in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So most, if not all, persons will have at times congestion of the liver, causing slight functional derangements and temporary illness, and yet in the contemplation of parties entering into contracts of Life Insurance, and having regard to the general health and continuance of life, it may be safely said that in such cases there is no disease of the liver."

"In construing a policy of Life Insurance it must be gen-

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erally true that before any temporary ailment can be called a disease it must be such as to indicate a vice in the constitution, or to be so serious as to have some bearing upon the general health and the continuance of the life, or such as according to common understanding would be called a disease; and such has been the opinion of the best writers and judges. Hence, whether the insured had congestion of the liver, and whether the congestion was of such a character as to constitute a disease of the liver, within the meaning of the policy, were both questions properly submitted to the jury, and their determination thereon is conclusive."

So in regard to the habits of the insured, as to the use of alcohol, morphine, tobacco, or any other drug or stimulant. It is not sufficient to prove an isolated case of indulgence or excess, but a customary, habitual use. In the case of *Foley vs. Insurance Company* (105 United States, p. 350), this distinction is ably drawn by Mr. Justice Field. He says: "The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him.

"When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetitions of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions

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on that occasion might indicate a night of excessive indulgence. The Court did not, therefore, err in instructing the jury that if the habits of the insured, 'in the usual, ordinary, and every-day routine of his life were temperate,' the representations made are not untrue within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit."

In the second group I have mentioned, medical testimony would become necessary only to prove violation of the promise of the insured not to become so far intemperate as to impair his health, some policies stipulating that they shall become void if this contingency happen, and would be subject to the limitations already recited. I know of but two cases on this point, one of *Insurance Company vs. Insurance Company in the U. S. Circuit Court of Connecticut* (17 Blatchford, p. 142), where a suit was brought in equity to cancel the policy on this ground, and the Court held that the desired relief should be granted, because of its expediency and in order to be just to the other policy-holders; that the foundation of insurance is the law of average, and if the insured are permitted knowingly to indulge in practises that notoriously invite disease, the investment of other insured persons is jeopardized. But in the case of *Insurance Company vs. Bear* (26 Federal Reporter, p. 582), upon a precisely similar state of facts, the Court refused the prayer of the Company holding that a Court

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of Equity would not set aside a policy of life insurance during the life of the assured on the ground that it has been rendered void by something not appearing on the face of the policy, and which could be proved by extrinsic evidence; that if such power existed, it was not a case for the ordinary exercise of the discretionary power of the Court of Equity to order a cancellation, because the insured, who was then intemperate, might reform and live out the ordinary expectation of life.

The two cases offer another illustration of the great truth that lawyers, as well as doctors, often differ in opinion.

But important as are the functions of the medical witness in these two groups of cases, it is in the third that his services become absolutely indispensable. Many of the companies have now, and for many years to come will have, policies in force prohibiting suicide either absolutely or within a limited period after date, under penalty of forfeiture of the insurance. Indeed, I am not at all sure that public policy would not, or at least should not, prevent a man from procuring a pecuniary benefit to his estate by his deliberate self-destruction. This was intimated by Judge Rapallo in the case of *Van Zandt vs. Insurance Company* (55 New York, 139), when he says, "The policy creates in the insured a pecuniary interest in his own death. To a man laboring under the pressure of poverty, and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations, or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question (that the policy should be void if the

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insured should die by his own hand) was inserted. The condition, therefore, is to be so construed as to exclude only those cases in which these motives could not have operated — such as accident or delirium. So far as considerations of public policy have any place in determining such a question, they are undoubtedly in favor of confining the exceptions to the condition to cases in which the self-destruction is clearly shown to have been accidental or involuntary.”

It is well settled that the beneficiary under a policy cannot obtain the money by killing the insured — see *Armstrong vs. Insurance Company*, 117 U. S., p. 591, in which the facts were as follows: A creditor of Armstrong, one Hunter, persuaded him to insure his life and assign the policy as security for the debt, and some six weeks after murdered him, for which he was convicted and hung. Before his execution, he assigned the policy to the widow of his victim, who of course, under the familiar rule of law, took it subject to all equities existing between her assignor and the company. The Court per Mr. Justice Field held that “independently of any proofs of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.”

The same views of public policy control where the death follows as the result of a crime, even without any express

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stipulation to that effect. This principle was first laid down in a suit on a policy upon the life of the celebrated forger Fauntleroy, who was hung for the commission of felonies. The policy was sustained in the Rolls Court, but upon appeal to the House of Lords the decree was reversed upon the advice of Lord Chief Justice Lyndhurst. He thought that an insurance expressly against the event would be void, and therefore effect could not be given to a general policy upon an event which, if expressed in terms, would have rendered the policy, as far as the condition went, at least, absolutely void. A stipulation to uphold a policy in any such case would be contrary to sound policy, as taking away one of the restraints operating on the minds of men against the commission of crimes by the interest which they have in the welfare and prosperity of their connections. (*Amicable Society vs. Bolland*, 4 Bligh, N. S., 194.)

This case was followed in *Hatch vs. Insurance Co.* (120 Mass., p. 550), where a married woman, upon whose life a policy was issued, voluntarily submitted to an operation for abortion without any justifiable medical reason, from which death resulted. Judge Endicott, speaking for the Court, says: "It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and by the laws of all civilized states, and known by her to be dangerous to life, did actually result in death. And the question is raised whether for a death so caused the defendant is liable.

"We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the

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defendant from insuring her against its consequences: for we can have no question that a contract to insure a woman against the risk of her dying under and in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth."

In my opinion, these cases establish definitely the principle that no one can profit by his own wrong, and I think them fairly applicable when the estate of the insured is to receive the benefit of his deliberate self-destruction.

It is well settled that there is no presumption of suicide, and where a dead body is found under circumstances consistent with either an accidental injury or a suicidal act, in the absence of proof, "the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person." (*Insurance Company vs. McConkey*, 127 United States, p. 661.) So when a medical man is called to view a corpse he should note all the attendant circumstances and surroundings with the minute attention to details prescribed by the standard writers on Medical Jurisprudence, as the elucidation of the truth often depends upon matters which appear at the time to be of the most trivial importance. A very striking story on this point was told by Lord Eldon, late in life, and is thus recorded in his biography: "I have heard some very extraordinary cases of murder tried. I remember in one where I was counsel, for a long time the evidence did not appear to touch the prisoner at all, and he looked about him with the most perfect unconcern, seeming to think himself quite safe. At

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last the surgeon was called, who stated that the deceased had been killed by a shot — a gun shot — in the head, and he produced the matted hair and stuff cut from and taken out of the wound. It was all hardened with blood. A basin of warm water was brought into court, and as the blood was gradually softened, a piece of printed paper appeared — the wadding of the gun — which proved to be half of a ballad. The other half had been found in the man's pocket when he was taken. He was hanged."

In this case the evidence was direct and conclusive, but often, and it may be said usually, the proof of a suicide or murder is largely inferential and circumstantial. We have recently had in our State a case of this character, which has attracted much attention, and aroused great interest, that of Carlyle W. Harris, tried and convicted for the murder of his wife by poison. I would advise any one who still entertains a lingering doubt of the justice of that conviction to read the masterly opinion of Judge Gray in the Court of Appeals (136 New York, p. 423), in which the facts are summed up with a directness and force which amount to a demonstration. The Judge very truly observes that "the mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet if the facts brought out, when taken together, all point in the one direction of guilt and to the exclusion of any other hypothesis, there is no substantial reason for that reluctance."

While cases may and do occur in which the fact of suicide may be proved by direct evidence, such as the letters or declarations of the deceased, or the testimony of eye-witnesses,

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as a rule it is necessary to invoke the aid of the medical expert and depend upon his deductions from the observations he has made.

Most important is his assistance in the numerous attempts which have been made to defend companies by substituting a corpse represented to be that of the insured. Here we come to the domain of personal identification, one of the most perplexing subjects which has ever bothered and confused judges as well as juries. From the days of Martin Guerre down to those of the Tichborne claimant, men have been able to conceal or simulate identity, and to produce evidence in abundance perfectly honest and yet directly contradictory. The reason is not far to seek and is so happily stated by a writer in the *London Spectator*, cited in the Third Edition of Wharton & Stille's *Medical Jurisprudence* (Vol. 2, Sect. 1240), that I allow myself the pleasure of quoting freely from his article.

“We are all apt to think that we observe faces very carefully; but it is quite certain, more certain than almost any assertion of the same kind, that we do not so observe them. We are also apt to believe that the difference in faces is very great, is radical, and not dependent upon accidental features, yet it is almost certain that no such difference exists; that men are in reality as nearly alike as animals appear to be. Take, for instance, in evidence of both of these propositions — of the carelessness of our usual glance, and of the similarity among men — a fact which a number of our readers can test for themselves. No man, on landing at an Indian or Chinese port for the first time, can for a few days tell one man from

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another. The natives are more decidedly unlike than so many Englishmen, because, in addition to every other distinction, their complexions cover a wider range of color; but, being similarly dressed, they seem for a few days as much alike as so many sheep, who are all alike to a Londoner, but among whom a shepherd or a dog makes no mistake. Now, if men were much unlike, more unlike than the sheep are, no such curious haziness would be possible: nor would it be if the observer were unconsciously in the habit of studying the form and character of each face. — Death, as a rule, while it leaves much unchanged, absolutely destroys every distinction based either upon color or upon fatness, and modifies thinness in the most unexpected way, revealing unsuspected depths about the brow and mouth, while leaving the cheek untouched. No child is recognizable in death by mere acquaintance, because in children's faces the prominent points are color and contour. — Expression changes quickly — may change permanently. We all say, every now and then, 'his face is quite changed,' while nothing is changed except perhaps the expression and the color. Madness, extreme anger, drink, will all change a well-known face till it is almost unrecognizable; and though no doubt it requires a combination of circumstances to deceive a wife as to her husband's identity, still there is one expression she has never seen, and that is death, of all the influences the one which may most modify expression, both by altering the set of the features and changing the emotional medium through which we regard them."

It follows that while the identification of the living is some-

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times difficult, this difficulty is enormously increased after death, especially when, as usually occurs when an attempt at substitution is made, the corpse is partially burned or otherwise mutilated. It then becomes important to seek for some personal marks or defects, and these are frequently found in the teeth. It is well remarked by Mr. George E. Harris, in his able treatise on the Law of Identification, that "we often complain of decayed teeth and resort to the dentist. But it seems, from observation and scientific tests, that after death, when the human remains have mingled with the dust, or been consumed by fire, the teeth remain and may be identified, and the dentist may recognize and identify his work on the teeth, performed in the lifetime of the subject."

This matter became of great importance to the Mutual Life Insurance Company in the case of Winfield Scott Goss, a young mechanic, who, after insuring his life for twenty-five thousand (25,000) dollars, in that and other companies, hired a small shanty in the outskirts of Baltimore, for the ostensible purpose of using it as a laboratory for some experiments in the effort to make an artificial india-rubber. Soon after, the building took fire, was totally consumed, and amid the ruins were found the charred remains of a human being, which were identified by Goss's wife and his brother-in-law, one Udderzook, as the body of the insured. The circumstances were suspicious in view of the large amount of insurance compared to the pecuniary resources of the alleged decedent, but the corpse was so far consumed that the only hope for the com-

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panies lay in the examination of the teeth. These were found to be so defective that the articulation of the deceased must have been affected, while Goss was noted for a set of fine, regular teeth, and interviews with more than fifty dentists in Baltimore, Philadelphia, and Washington failed to show that he had ever had any work done upon them. The jury, of course, found a verdict for the plaintiff, but the murder of Goss soon after by Udderzook brought the whole plot to light, and proved the correctness of the position taken by the companies.

In a quite recent case, the resident of a Western State obtained a large amount of insurance on his life, and soon after his residence (a small farmhouse) was burned down one night, and he was alleged to have perished in the flames. In this case also the corpse found after the fire was mostly consumed, but the ingenious speculator was, unfortunately for himself, not conversant with the principles of Legal Medicine. He was not aware that the human skeleton changes with years, showing indelible marks of the flight of time, and while he was himself but thirty-three (33) years of age, he had procured the dead body of one whom the medical examiners pronounced to have lived for at least sixty years. The arrest of the insured, still in the flesh, followed soon after, and again vindicated the claim of Legal Medicine to be of service to Life Insurance.

In the short time which can be given for a paper on any subject on such an occasion as the present, it is impossible to do more than offer the briefest outlines of one so important as that which I have considered. But I trust I have said

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sufficient to show how vital to the interests of life insurance is a careful study of the science of Medical Jurisprudence by both the physicians and the lawyers interested in the growth and development of that wonderful product of modern civilization.



SPEECH AT ST. NICHOLAS CLUB
DINNER

AT A DINNER GIVEN BY THE ST. NICHOLAS CLUB ON
OCTOBER 21ST, 1898, COMPLIMENTARY TO
CHAPLAIN GEORGE R. VAN DE WATER





SPEECH AT ST. NICHOLAS CLUB DINNER

Mr. President and Fellow Members of the St. Nicholas Club:

IT is with feelings of gratification too deep for expression that I enter upon the discharge of the duty committed to me in presenting this token of a sincere respect and affection to one whom we all honor and love.

Whatever may be our views as to the merits or justness of the late war with Spain, whatever we may think of the propriety of keeping for ourselves the far distant Philippines, or the nearer islands of Cuba and Porto Rico, whether we approve or disapprove the details of the campaigns, Democrat or Republican, Expansionist or Contractionist, *Tros Tyriusve* we unite in admiration for the American soldier. When the guns which thundered against Fort Sumter awoke the nation from a delusive dream of peace, the dandies of Fifth Avenue and of Beacon Street were among the first to rush to the defense of the insulted flag, as the dandies of Hyde Park but a few years before had followed their flag to the walls of Sebastopol, and led the assaults on the Malakoff and the Redan. So, when the emergency arose, the so-called dudes of to-day showed the same manly courage and action as did their predecessors, and the same high spirit was

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manifested by men of every class and calling. Nor is it the least valuable result of this war that men from every section, North and South, East and West, dude and cowboy, rallied around one flag in the service of one country. Nor have we less regard for those who, sharing the dangers and privations of the others, were men of peace, not war, whose duty it was to comfort the sick and wounded, to bury the dead, to console the survivors — a service, it may be said, more trying and exhausting and requiring a higher courage — for while others on the fighting line were absorbed in the active discharge of their work, and the intense demand upon their physical strength left no leisure for reflection, these had no such distraction to blind their eyes to the horrors which they witnessed and the dangers to which they were exposed, and of these one of the bravest, calmest, and most efficient is our honored guest to-night.

I will not detain you by reciting the deeds of the Seventy-First Regiment from the time it left New York until the poor and feeble remnant returned. They are part of the history of our country, familiar to all, and what details of interest there may be should properly come from the lips of the Regimental Chaplain. I am concerned only to express to him the pride that his fellow-members of the St. Nicholas Club feel that one of their number should have borne himself so nobly amid such sufferings and dangers as he has experienced, and the sincere affection, which they entertain for him widened and deepened as it has been by this episode in his life. As a token of that pride and affection, on their behalf I present to him this loving cup.

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And I do so, Sir, in the hope and firm belief that it will ever hereafter serve not only to recall the kindly feelings of its donors, but also the memory of gallant deeds well done, and arduous and distressing duty faithfully performed.



SPEECH AT DINNER OF ALUMNI
OF TRINITY COLLEGE

AT THE DINNER OF THE ALUMNI OF TRINITY COL-
LEGE AT HARTFORD, CONN., ON JUNE 27TH, 1906
AFTER RECEIVING THE DEGREE OF LL.D.
AT THE COMMENCEMENT THAT
MORNING



SPEECH AT DINNER OF ALUMNI OF TRINITY COLLEGE

Mr. President and Gentlemen:

IT gives me great pleasure to be called upon to respond to this toast, as I am thereby given the opportunity to say what I wish. My experience at public dinners, both as speaker and listener, has taught me that the statement of a toast, like the announcement of a text, serves simply to present the speaker to the audience. When I was first advised of the honor which the Trustees of my dear Alma Mater had voted to confer upon me, I was somewhat puzzled to know what I had done, to deserve it; but in justification for their conduct I will venture to relate one incident in my long experience at the Bar.

Shortly before I left the service of the Mutual Life Insurance Company of New York, some twelve years ago, the State of Pennsylvania passed an act providing that no restriction or condition contained in an application for a policy of life insurance should be binding upon the insured, unless a copy of the application were delivered to him with his policy. Through some carelessness, the Company was not advised of the passage of this act until some few days after it had gone into effect, and in the interval several policies were issued, among which was one to a man in Philadelphia, who, a few days after the receipt of his policy and payment of the

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first premium, committed suicide. Investigation showed that his affairs were hopelessly involved, that he could not by any possibility have carried the policy, and it seemed to be clearly an attempt on his part to swindle the Company out of the moneys. But the restriction against suicide was contained in the application, of which no copy had been furnished him, and therefore under the act mentioned that defense was not available. In thinking it over I concluded that what is called the rule in Fauntleroy's case would apply, — Fauntleroy having been a banker in London of considerable prominence, who committed a forgery and was hung for it about one hundred years ago. The Company in which his life was insured refused payment on the ground that death at the hands of justice as a punishment for crime was not a risk which they had assumed, and the Court sustained their contention. I advised the Company, therefore, to refuse payment of the policy and defend the suit on the ground that it did not insure against suicide, and I am happy to say that the Supreme Court of the United States, to which the case finally went, concurred in my views, and that is now the law of this land.

Another aspect of the matter appeals to me very strongly. Many who hear me doubtless remember the Reverend Dr. Washburn, for many years Rector of St. John's Church in this city, and subsequently Rector of Calvary Church in New York, where he died. The Doctor was a profound scholar and deep thinker, an earnest and scholastic preacher, but was so absorbed in his pursuits that he had little time for the social side of life. As long ago as when I was in college, the

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story was told that one of his vestrymen took occasion to remonstrate with him on his indifference to those amenities, telling him that he would very largely increase his strength and his influence by paying some attention to them. The Doctor replied that the congregation must take their choice, as he could do one of two things: he could write sermons, or he could make parochial calls, but he hadn't time for both. He maintained the same course of life after his removal to New York, and saw very little of his fellow-men, but his church was crowded at every service. His funeral was attended by the Bishop and all the prominent clergymen of the city, as well as by many others, and after the service a meeting of the clergy was held in the vestry-room of the church, to take appropriate action on the death of their departed brother. One after another of the clergy rose to express in the strongest terms his high appreciation and deep affection for their dead friend. During all these proceedings, as Bishop Potter tells the story, a pale-faced, tearful little woman stood in the doorway, supporting herself by the jamb, and listening with intense eagerness to every word that was spoken, until finally, unable to contain herself any longer, she burst out with the bitter cry, — "Oh, if you all loved Edward so, why didn't you tell him it while he was alive?"

This reproach cannot apply to you, and from the bottom of my heart I thank you, Mr. President, and through you the gentlemen composing the Board of Trustees, that you have conferred upon me this token of your regard and esteem, while I am still alive to receive it and to enjoy it.

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